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**REPORTS**  
**OF**  
**CASES IN BANKRUPTCY,**

**DECIDED BY**  
**THE LORDS COMMISSIONERS,**

**AND BY**  
**THE LORD CHANCELLOR**  
**COTTENHAM,**

**AND**  
**THE COURT OF REVIEW.**

---

**By BASIL MONTAGU AND SCROPE AYRTON, ESQRS.,**  
**BARRISTERS AT LAW.**

---

**WITH**  
**A DIGEST**  
**OF THE CASES REPORTED IN THIS VOLUME,**  
**AND OF**  
**THE CONTEMPORARY CASES RELATING TO BANKRUPTCY**  
**DECIDED IN ALL THE OTHER COURTS.**

---

**VOL. II.**

---

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# NAMES OF THE CASES

## REPORTED IN THIS VOLUME.

A.		Page
ABBOTT, ex parte, in the matter of Barber .....	599	
Adams, ex parte, in the matter of Freidman.....	706	
Alexander, ex parte, in the matter of Hobbs .....	492	
Angle, ex parte, in the matter of Smith .....	38	
Annandale, ex parte, in the matter of Curtis.....	19	
Armistead, in the matter of, ex parte Green .....	31	
Attwood, ex parte, in the matter of Jackson .....	24	
Aughtie, in the matter of, ex parte Dugard .....	26. 27.	84
B.		
Bailey, ex parte, in the matter of Bailey .....	86	
Baker, in the matter of, ex parte Williams .....	616	
Barber, in the matter of, ex parte Abbott .....	599	
Barrington, ex parte, re Barrington.....	72. 245.	255
———— in the matter of, ex parte Sidebotham...	79.	146
Bath, in the matter of, ex parte Topham .....		484
Beasley, ex parte, in the matter of Parker .....		632
Bell, ex parte, in the matter of Brown .....		578
———— ex parte, in the matter of Ewer .....		733
Belcher, ex parte, in the matter of Maberly.....		160
Bender, ex parte, in the matter of Fenwick.....		681
Benedicke, ex parte, in the matter of Pearson .....		692
Benham, ex parte, in the matter of Bramwell .....		272
Bennett, ex parte, in the matter of Stephens.....		306
Benson, ex parte, in the matter of Tay .....		582
Bentley, in the matter of, ex parte Vere .....		123
———— in the matter of, ex parte Brunskill .....		220
Berkeley, ex parte, in the matter of Deacon .....		54
Bignold, ex parte, in the matter of Brereton.....		633
———— ex parte, in the matter of Postle .....		16. 214



	Page		Page
Billing, in the matter of, ex parte Stephens .....	482	Brown, in the matter of, ex parte Bell .....	578
—— in the matter of, ex parte Thompson.....	483	—— ex parte, in the matter of Town .....	29
Birks, in the matter of, ex parte Carlow .....	39	Brunskill, ex parte, in the matter of Bentley .....	220
—— ex parte, in note .....	208	Buckton, ex parte, in the matter of Blenkin and Shackleton.....	735
Blake, ex parte, in the matter of Calthorpe.....	481	Burn, ex parte, in the matter of Isaacs .....	483
Blandy, ex parte, in the matter of Forster.....	24	Butterworth, in the matter of, ex parte Wilson.....	61
Blenkin, in the matter of, ex parte Digby and Jones ...	735	—— in the matter of .....	688
—— in the matter of, ex parte Buckton .....	735		
Bloxham, in the matter of, ex parte Elliston .....	365	C.	
Boardman, ex parte, in the matter of Boardman .....	209	Calthorpe, in the matter of, ex parte Blake .....	481
Borrodaile, ex parte, in the matter of Rucker .....	398	Campbell, in the matter of, ex parte Perring .....	486
Borron, ex parte, in the matter of Parratt.....	626	Carlow, ex parte, in the matter of Birks .....	39
Box, in the matter of, ex parte Harvey.....	593	Cass, ex parte, in the matter of Rivers .....	170
Booth, ex parte, in the matter of Kew.....	93	Castell, in the matter of, ex parte Gordon.....	30
Braddick, in the matter of, ex parte Elston, in note... 346		Chambers, ex parte, in the matter of Chambers...440.	744
Bradstock, ex parte, in the matter of Wilson..... 490.	593	—— in the matter of, ex parte Groom..... 143.	742
Brand, ex parte, in the matter of Smith .....	707	Champion, in the matter of, ex parte Reay .....	33
Bremidge, ex parte, in the matter of Cooke.....	732	Chippendale, ex parte, in the matter of Potter.....	299
Bright, in the matter of, ex parte Molineux .....	245	Chitty, in the matter of, ex parte Ellis .....	371
Britten, ex parte, in the matter of Britten.....	687	Clarkson, ex parte, in the matter of Fear .....	4
—— in the matter of, ex parte White .....	104	Collyer, ex parte, in the matter of Cowell .....	29
Brookes, ex parte, in the matter of Moore.....	78	Cooke, in the matter of, ex parte Bremidge ... ..	732



## NAMES OF THE CASES.

	Page		Page
Cooper, ex parte, in the mat- ter of Cooper.....	689	Deacon, in the matter of, ex parte Berkeley .....	54
——— in the matter of, ex parte Crosfield .....	543	——— in the matter of, ex parte Porter .....	281
——— in the matter of, ex parte Lovegrove .....	4	Dewdney, ex parte, in the matter of Davy .....	72
Copeland, ex parte, in the matter of Thompson .....	177	Diack, ex parte, in the mat- ter of Diack .....	675
Crosbie, ex parte, in the matter of Kidder .....	393	Dickson, ex parte, in the matter of Hutchinson ...	99
Crosfield, ex parte, in the matter of Cooper .....	543	Digby and Jones, ex parte, in the matter of Blenkin	735
Cornie, in the matter of, ex parte Flower .....	224	Douglass, ex parte, in the matter of Ellis .....	218
Cowdry, in the matter of, ex parte Martin .....	243	Dudderidge, in the matter of, ex parte Laing.....	381
Courtenay, ex parte, in the matter of Davis .....	227	Dugard, ex parte, in the mat- ter of Aughtie .....	26. 27. 84
Coward, in the matter of, ex parte Gibson .....	4	Durrant, ex parte, in the matter of Thurkill.....	672
——— and Fear, in the matter of, ex parte Hare	479		
——— in the matter of, ex parte Liddiard .....	87	<b>E.</b>	
Cowell, in the matter of, ex parte Collyer.....	29	Eardley, ex parte, in note...	85
Curtis, in the matter of, ex parte Annandale .....	19	Edwards, in the matter of, ex parte Hawley .....	426
——— in the matter of .....	732	Ellis, in the matter of, ex parte Douglass .....	218
		——— ex parte, in the matter of Chitty .....	371
<b>D.</b>		Elliston, ex parte, in the matter of Bloxham .....	365
Davis, in the matter of, ex parte Courtenay.....	227	Elston, ex parte, in the mat- ter of Braddick, in note...	346
——— in the matter of, ex parte Telfourd .....	389	Ewer, in the matter of, ex parte Bell .....	733
——— in the matter of, ex parte Latey .....	609		
Davy, in the matter of, ex parte Dewdney .....	72	<b>F.</b>	
Dawson, ex parte, in the matter of Finden .....	94	Faulkner v. Rex .....	311
		Fear, in the matter of, ex parte Clarkson .....	4







## NAMES OF THE CASES.

vii

	Page		Page
Hinton, ex parte, in the mat- ter of Hinton.....	361	Jones, in the matter of, ex parte Johnston .....	390
Hobbs, in the matter of, ex parte Alexander.....	492	Jorie, in the matter of, ex parte Ward.....	391
Holt, in the matter of, ex parte Smart .....	60	Joyner, ex parte, in the mat- ter of Sharpe.....	1
— ex parte, in the matter of Makin .....	562		
Hunt, ex parte, in the mat- ter of Fox .....	18	K.	
— in the matter of, ex parte Hutchins .....	727	Keating, Marsh v. ....	744
Hutchinson, in the matter of, ex parte Dickson .....	99	Kensington, ex parte, in the matter of Lancaster .....	300
— ex parte, in the matter of Freme .....	35	Kenton, in the matter of, ex parte Martin .....	293
— ex parte, in the matter of Hunt .....	727	Kew, in the matter of, ex parte Booth .....	93
Hyslop, in the matter of ...	289	Kidder, in the matter of, ex parte Crosbie.....	393
		— in the matter of, ex parte Watkins .....	348
I.		King, ex parte, in the mat- ter of Severn .....	410
Ings, in the matter of .....	671	— ex parte, in the mat- ter of Watkins .....	676
Isaacs, in the matter of, ex parte Burn.....	483	Kirby, ex parte, in the mat- ter of Pottinger.....	142
Iveson, in the matter of, ex parte Hall .....	392	Knight, ex parte, in the matter of Lewis.....	545
		— ex parte, in the mat- ter of Pownall .....	568
J.			
Jackson, in the matter of, ex parte Attwood and Co. ...	24	L.	
Jacobs, ex parte, in the mat- ter of Jacobs .....	102	Laing, ex parte, in the mat- ter of Dudderidge.....	381
Jarman, ex parte, in the mat- ter of Theed .....	119	Lancaster, in the matter of, ex parte Kensington.....	300
Johnston, ex parte, in the matter of Jones .....	390	Latey, ex parte, in the mat- ter of Davis .....	609
— in the matter of, ex parte Hewitt .....	477	Lavender, ex parte, re La- vender .....	11. 103. 117
— ex parte, in the matter of Story .....	54	Lee, ex parte, in the matter of Lee .....	15
Jones, ex parte, in the mat- ter of Jones .....	41. 193	Levi, ex parte, in the matter of Levi .....	685



	Page		Page
Lewis, ex parte, in the mat- ter of Lewis .....	670	Möore, in the matter of, ex parte Brookes .....	78
—— in the matter of, ex parte Knight .....	545	Moore, in the matter of, ex parte Reynolds .....	104
Liddiard, ex parte, in the matter of Coward .....	87	Molineux, ex parte, in the matter of Bright .....	245
Litt, in the matter of, ex parte Masterman .....	209	Myers, ex parte, in the mat- ter of Sudell .....	87
Living, ex parte, in the mat- ter of Tombs .....	223		
Llewellyn, ex parte, in the matter of Williams.....	298	N.	
Lorymer, in the matter of, ex parte Powell .....	533	Neirinckx, ex parte, in the matter of Neirinckx...384.	542
Lovegrove, ex parte, in the matter of Cooper .....	4	Newton, ex parte, in the mat- ter of Goren .....	51
M.		O.	
Maberly, in the matter of... 686		Ord, ex parte, in the matter of Ord .....	724
—— in the matter of, ex parte Belcher.....	160	Osborn, ex parte, in the mat- ter of Gunning .....	140
—— ex parte, in the matter of Young .....	23		
—— in the matter of, ex parte Simpson .....	294	P.	
Makin, ex parte, in the mat- ter of Holt.....	562	Parratt, ex parte, in the mat- ter of Borron.....	626
Manning, in the matter of, ex parte Smith .....	536. 744	Parker, in the matter of, ex parte Beasley.....	632
Marsh v. Keating .....	744	Pearson, in the matter of, ex parte Salter and Soper	55
Martin, ex parte, in the mat- ter of Cowdry .....	243	—— ex parte, in the matter of Benecke.....	692
—— ex parte, in the mat- ter of Kenton.....	293	Pemberton, ex parte, in the matter of Stokes .....	548
Massey, ex parte, in the mat- ter of Massey.....	173	Penfold, in the matter of, ex parte Ramsbottom.....	79
Masterman, ex parte, in the matter of Litt .....	209	Percival, in the matter of, ex parte Taylor.....	36
Matthew, ex parte, in the matter of Matthew .....	73	Perring, ex parte, in the matter of Campbell .....	486
Miller, in the matter of, ex parte Grazebrook, in note	53	Phibbs, in the matter of, ex parte Fife .....	574
		—— in the matter of, ex parte Vanheythusen .....	519



	Page
Phillips, in the matter of, ex parte Phillips .....	526
Pocklington, in the matter of .....	729
Porter, ex parte, in the matter of Robinson .....	220
——— ex parte, in the matter of Deacon.....	281
Postle, in the matter of, ex parte Bignold .....	16. 214
Potter, in the matter of, ex parte Chippendale.....	299
Pottinger, in the matter of, ex parte Kirby .....	142
Powell, ex parte, in the matter of Lorymer .....	533
Pownall, in the matter of, ex parte Knight .....	568
——— ex parte, in the matter of Pownall .....	707
Prater, ex parte, in the matter of Hawley.....	364
Prior, in the matter of, ex parte Young .....	228

R.

Raikes, in the matter of, ex parte Waithman.....	364
Race, ex parte, in the matter of Race .....	242
Ramsbottom, ex parte, in the matter of Penfold .....	79
Reay, ex parte, in the matter of Champion .....	33
Rex v. Faulkner .....	311
Reynolds, ex parte, in the matter of Moore .....	104
Richards, ex parte, in the matter of Hawley.....	59. 426
Rivers, in the matter of, ex parte Cass .....	170
Richards, ex parte, in the matter of Trevor .....	75

	Page
Robinson, in the matter of, ex parte Gould .....	48
——— in the matter of, ex parte Porter .....	220
Rogers, ex parte, in the matter of Rogers .....	153
Rucker, in the matter of, ex parte Borrodaile .....	398

S.

Sandys, in the matter of, ex parte Whish .....	214
Sanders, ex parte, in the matter of Green .....	684
Schlesinger, in the matter of, ex parte Watts .....	621
Seaber, ex parte, in the matter of Seaber .....	588
Severn, in the matter of, ex parte King.....	410
Sharpe, in the matter of, ex parte Joyner .....	1
Shaw, in the matter of, ex parte Smith .....	60
Sidebotham, ex parte, in the matter of Barrington...79.	146
Simpson, ex parte, in the matter of Maberley .....	294
Smart, ex parte, in the matter of Holt.....	60
Smith, ex parte, in the matter of Manning .....	536. 744
——— in the matter of, ex parte Brand .....	707
——— ex parte, in the matter of Smith .....	213
——— in the matter of, ex parte Angle .....	38
——— ex parte, in the matter of Shaw .....	60
——— ex parte, in the matter of Smith .....	75. 382



	Page		Page
Soper, ex parte, in the matter of Salter and Pearson	55	Thompson, in the matter of, ex parte Hall.....	294
Stephens, in the matter of, ex parte Bennett .....	306	Thurkell, ex parte, in the matter of Durrant.....	672
———— ex parte, in the matter of Stephens .....	31	Tilson, in the matter of, ex parte Forth .....	381
———— ex parte, in the matter of Billing .....	482	Tombs, in the matter of, ex parte Living .....	223
Stone, ex parte, in the matter of Whitehead .....	503	Topham, ex parte, in the matter of Bath .....	484
Stokes, in the matter of, ex parte Pemberton .....	548	Tomlinson, in the matter of, ex parte Walton.....	242
Story, ex parte, in the matter of Johnston .....	54	Town, ex parte, in the matter of Brown .....	29
Sudell, ex parte, in the matter of Myers .....	87	Tristram, in the matter of, ex parte Hartley .....	496
Swan v. the Bank of Scotland .....	656	Trover, in the matter of, ex parte Richards .....	75

## T.

Tardieu, in the matter of, ex parte Harland .....	723
Tarrant, in the matter of, ex parte Wilks .....	667
Tate, in the matter of, ex parte Halford.....	52
Taylor, ex parte, in the matter of Percival .....	36
Tay, in the matter of, ex parte Benson .....	582
Telfourd, ex parte, in the matter of Davis .....	389
Theed, in the matter of, ex parte Jarman.....	119
Thompson, ex parte, in the matter of Wyatt.....	505
———— ex parte, in the matter of Billing .....	483
Thompson, ex parte, in the matter of Thompson ...40.	41
———— in the matter of, ex parte Copeland .....	177

## V.

Vanheythusen, ex parte, in the matter of Phibbs.....	519
Vere, ex parte, in the matter of Bentley .....	123

## W.

Waithman, ex parte, in the matter of Raikes .....	364
Wallas, ex parte, in the matter of Hambley .....	586
Walker, in the matter of ...	267
Walton, ex parte, in the matter of Tomlinson .....	242
Ward, ex parte, in note.....	219
———— ex parte, in the matter of Jorie.....	391
Watts, ex parte, in the matter of Schlesinger .....	621
Watkins, ex parte, in the matter of Kidder .....	348



# NAMES OF THE CASES.

xi

	Page		Page
Watkins, in the matter of, ex parte King .....	676	Williams, ex parte, in the matter of Webb.....	578
Webb, in the matter of, ex parte Williams .....	578	Wilson, ex parte, in the mat- ter of Butterworth.....	61
Wellman, in the matter of...	292	—— in the matter of, ex parte Bradstock.....	490. 593
Whalley, ex parte, in the matter of Whalley .....	722	Wilks, ex parte, in the mat- ter of Tarrant .....	667
Whish, in the matter of, ex parte Sandys .....	214	Woodward, in the matter of, ex parte Halford .....	289
White, ex parte, in the mat- ter of White .....	541	Wyatt, in the matter of, ex parte Thompson .....	505
—— ex parte, in the mat- ter of Britten .....	104		
Whitehead, in the matter of, ex parte Stone .....	503		
Williams, in the matter of, ex parte Llewellyn.....	298		
—— ex parte, in the matter of Baker.....	616		

## Y.

Young, ex parte, in the mat- ter of Maberley.....	23
—— ex parte, in the mat- ter of Prior .....	228



## ERRATA.

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Page 32, line 18, there should be a full stop after the word "believed."

Page 61, last line of marginal note, for "Betcher" read "Belcher."

Page 144, line 14, for "*Cousins*" read "*Cossens*;" and line 15, for "*Adol.*" read "*Ald.*"

Page 255, line 4 from bottom, for "7 Geo. 4. c. 16." read "c. 57."

Page 283, line 8 of marginal note, for "deed" read "debt."

Page 312, Sir *Oswald Moseley's* case is reported in 5 *Nev. & Mann.* 261.

Page 348, the name of the case is "*ex parte Burbridge*," not "*ex parte Watkins*."

Page 425, *Smith v. Smith* is reported in 1 *Young & Collyer*.

Page 440, line 6 from bottom of text, insert the word "banking" after "as there had not been any."

Page 483, dele the words "*See a note on this in the Appendix*," at the end of the marginal note.



# CASES

## IN

# BANKRUPTCY.

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*Ex parte* JOYNER.—In the matter of SHARPE.

L. C.  
Aug. 4,  
1832.

IN *ex parte Elsee re Joyner*, *Mont.* 1, the Vice-Chancellor determined that the assignees were not entitled to travelling expenses under any circumstances. From this decision there was an appeal and cross petition, which were heard on a former day, when it was argued (Sir *E. Sugden* on one side and Mr. *Jacob* on the other), as in *ex parte Elsee*, *Mont.* 1, before the Vice-Chancellor, that travelling expenses should be allowed, and that the Vice-Chancellor had mistaken the effect of *ex parte Bray*, 1 *Rose*, 144; and of this opinion was the Lord Chancellor, whose judgment, subsequently delivered, was as follows:—

Assignees are entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate.

—  
*Ex parte Elsee*, *Mont.* 1, overruled.

THE LORD CHANCELLOR:—This is a cross appeal upon the disallowance of the assignees' travelling expenses. The Vice-Chancellor rests his disallowance upon *ex parte Bray*, 1 *Rose*, 144, and on the words of the statute. The words of the 106th section of 6 Geo. 4. c. 16. are, "All such monies as they shall have expended in suing out and prosecuting such commission, and all other just allowances." These words do not warrant



1832.

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*Ex parte*  
JOYNER.

 In the matter  
of  
SHARPE.

the general position, that travelling expenses can in no event be allowed to assignees. Is not money expended in travelling on the business of the commission, strictly speaking, money expended in prosecuting such commission? But were it otherwise, it would come under the description of "just allowances." In a country commission persons living in the country, rather than in London, or any other place, may most properly be chosen assignees, and their journeys ought to be allowed; and journeys under other circumstances might be equally essential to the right administration of the estate; and if *bonâ fide* undertaken for that purpose alone, it is most just that the estate which benefits by them should bear the burthen of the expense. In *ex parte Detastet*, 2 Gl. & J. 403, the expenses of endeavouring to apprehend the bankrupt were allowed; and in *ex parte Strange*, Mont. & Mac. 31, the Lord Chancellor allowed the expenses of prosecuting the petitioning creditors and a solicitor for conspiracy and perjury, though both the endeavour to apprehend in the one case, and the prosecution in the other, failed. In the latter case the Vice-Chancellor had disallowed the expenses, on the ground that even if the prosecution had succeeded, no benefit would have accrued to the estate; but the Chancellor held it was a proceeding for giving effect to the administration of the bankrupt laws, and came within the description of "just allowances." Travelling expenses plainly are not liable to his Honor's remarks in *ex parte Strange*, Mont. & Mac. 31, for proper journeys tend directly to benefit the estate. If, however, the case of *ex parte Bray*, 1 Rose, 144, had imposed a construction on the 106th section of the act, or the corresponding section of the 5th Geo. 2, under which the case arose, I should have held it binding; but that case clearly does not admit of the inferences



that have somewhat hastily been drawn from it in the works of different writers on the bankrupt laws. The expenses disallowed in *ex parte Bray*, 1 *Rose*, 144, were those of a journey to attend and canvass to get himself to be elected assignee. Lord *Eldon* held his conduct meritorious, because he went by desire of the creditors ; but he considered he had no discretion under the act to allow the expenses of the journey. How, indeed, could the expenses of such a journey be said to have been incurred, either in prosecuting the commission, or to be a just allowance by reason of his being assignee ? It appears then that *ex parte Bray*, 1 *Rose*, 144, lays down no general rule. Travelling expenses ought to be allowed wherever incurred necessarily or beneficially for the estate by the assignees acting as such. The door must not, however, be opened to charges made colourably, as where the travelling is by the assignee on his own private affairs, any more than the door ought to be closed against such expenses as are rendered necessary or expedient in the due discharge of the office imposed. This is a question which must in each instance be matter of inquiry. It is said that the commissioners did in this case inquire ; but as I am by no means satisfied that they had any thing before them but the statement of the two gross sums of 100*l.* and 40*l.*, I think, as it is very necessary to prevent the abuse which may creep in from such lumping charges, and as this is the first time the matter has been fully and generally considered, it must go back to the commissioner to be inquired into, with a direction founded on what I take to be the clear principle on this subject, viz. to allow all travelling expenses expressly incurred for the benefit of the estate, and having regard to the consideration of whether the journeys in question were undertaken solely on account of the estate.

1832.

—  
*Ex parte*  
JOYNER.  
In the matter  
of  
SHARPE.



C. of R.  
May 26,  
1834.

Assignees are entitled to travelling expenses *bonâ fide* incurred for the benefit of the estate.

*Ex parte* LOVEGROVE.—In the matter of COOPER.

MR. WILLCOCK:—In this case the assignees have paid expenses for travelling *bonâ fide* for the benefit of the estate; but the commissioners do not feel at liberty to allow them, without the sanction of this Court, on account of *ex parte Elsee, Mont. 1*, which has lately been over-ruled in *ex parte Joyner. (a)*

*Per Curiam*:—The assignees are entitled to all costs and expenses *bonâ fide* incurred in working the commission or fiat, including travelling expenses, if properly incurred, as to which the commissioners will inquire.

C. of R.  
July 25,  
1834.

*Ex parte* GIBSON in the matter of COWARD, and *ex parte* CLARKSON in the matter of FEAR and COWARD, in the matter of JAMES COWARD, and in the matter of MOORE.

*Ex parte* GIBSON. — In the matter of COWARD.

An agreement, on dissolution of partnership, to assign the partnership property in consideration of 50*l.* paid, and five bills for 100*l.* each delivered, is not executory, but executed.

JAMES COWARD, Henry Coward, and Richard Moore were partners. Henry Coward also carried on business in partnership with Fear.

On the 10th of August 1833, James Coward, Henry Coward, and Richard Moore dissolved partnership under the following agreement:—“An agreement made and entered into the, &c. between, &c. First, the said Henry Coward, James Coward, and Richard Moore have this day mutually agreed to dissolve the partner-

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(a) See the case preceding this.



ship between them, so far as regards the said *Richard Moore*, upon the terms following; that is to say, that the said *Henry Coward* and *James Coward* shall pay unto the said *Richard Moore* the full sum of 550*l.*, being the amount of capital brought into the concern by the said *Richard Moore*, and which sum is in full discharge of the said *Richard Moore*'s share of the stock in the shop, and of all profits arising from the partnership concern from its commencement; and it is agreed that the said sum of 550*l.* shall be paid in manner following:—The sum of 50*l.* shall be paid on the execution of this agreement, and the residue by five bills of exchange for 100*l.* each, to be drawn by the said *Richard Moore* upon and to be accepted by them the said *Henry Coward* and *James Coward*, payable to the order of the said *Richard Moore* at one, two, three, four, and five months after their respective dates; and the said *Richard Moore* hereby agrees to pay all his own private debts, except such as might have been contracted for housekeeping; and they the said *Henry Coward* and *James Coward* do hereby agree to pay and discharge the debts which have been contracted for housekeeping, and also to pay and discharge all debts due from the firm, &c.” On the 13th of August a notice of this dissolution was advertised in the London Gazette, which stated, that the debts owing to and from the firm would be paid and received by *Henry Coward* and *James Coward*, who would carry on the business in future. The bills were given accordingly. On the 4th of December 1833 a fiat issued against *Henry Coward* and *Fear*. The stock in trade of *Henry Coward* and *James Coward* thereon continued in the possession of *James Coward*. On the 11th of December 1833 a fiat issued against *James Coward*, and the petitioner *Gibson* was chosen assignee. On the 27th of February a fiat issued against *Moore*.

1834.

*Ex parte*  
GIBSON.

In the matter  
of  
COWARD.

*Ex parte*  
CLARKSON.

In the matter  
of  
FEAR.



1834.

—  
*Ex parte*  
 GIBSON.

In the matter  
 of  
 COWARD.

At the dissolution of the firm of *Coward* and *Moore* many debts were outstanding to and from the firm, some of which were afterwards received and paid by *Henry Coward* and *James Coward*, but others were unpaid at the time of the respective bankruptcies.

*Ex parte*  
 CLARKSON.  
 In the matter  
 of  
 FEAR.

The petitioners were assignees of *James Coward*. Various creditors of *Coward* and *Moore* had proved under the fiat against *James Coward*, but the assignees were advised they could not divide the assets of *James Coward* without the order of the Court.

The petition prayed that the assignees might be at liberty to pay the dividends on such proofs accordingly, &c.

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*Ex parte* CLARKSON. — In the matter of FEAR.

**THIS** cross petition, after stating the same facts, urged, that the agreement was fraudulent and void, and that all the property at the time of the agreement constituted and still did constitute a joint estate, to be distributed among the petitioner and the other joint creditors of *Coward* and *Moore*; and prayed that the agreement might be declared void as against the joint creditors of *Coward* and *Moore*, and the assets constitute a joint stock for payment of joint creditors; or if the agreement be declared valid, that separate accounts might be kept under the three fiats, and the petitioner be at liberty to prove under the three separate estates.

Mr. *Ching*, for the petitioner *Gibson*, insisted that the agreement in question did not pass the property, the agreement contained therein being executory when the bankruptcy intervened.

Mr. *Swanston* and Mr. *Bellamy*, for the respondents :  
 — On a dissolution of partnership by the retirement of a partner, followed by bankruptcy, the joint creditors have



no specific right against the joint property, even though remaining *in specie*, if the dissolution, &c. were *bond fide*; *ex parte Ruffin*, 6 *Ves.* 119; *ex parte Williams*, 11 *Ves.* 3. It even appears, from *ex parte Rowlandson*, 2 *Ves. & B.* 172., that the property would be in the reputed ownership of *James Coward* and *Henry Coward*.

Mr. Keene, for the petitioning creditor under the separate fiat against *James Coward*, was stopped by the Court, which decided, that though served he had no right to be heard.

Mr. Ching in reply:—Admitting, for the sake of argument, that the assignment transferred the legal right to the property, yet the two *Cowards* would hold as trustees. *Moore* might have filed a bill; *ex parte Williams*, 11 *Ves.* 3. If the agreement did transfer the property, it was subject to an agreement to pay all the joint creditors thereout, which has not been done. The present case cannot be distinguished from the first part of *ex parte Wheeler, Buck*, 25. In that case a retiring partner assigned all his share of the partnership effects to the continuing partner, who was to pay certain debts of the firm, and in consideration thereof the father of the continuing partner was to become surety for payment of an annuity to the outgoing partner, which he never did; and it was held that this agreement was executory, and, bankruptcy having intervened, the property was liable to the joint creditors. Lord *Eldon* there said, (p. 28,) “Now, the first question is, Whether this is an actual legal assignment or an executory agreement; because, if it is only an executory agreement, circumstances have occurred, as appears by the evidence, which may have the effect of putting an end to it;” and again, (p. 30,) “As to the notice in the Gazette, how can it be said to

1834.

—  
*Ex parte*  
GIBSON.

In the matter  
of  
COWARD.

*Ex parte*  
CLARKSON.

In the matter  
of  
FEAR.



1834.

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*Ex parte*  
GIBSON.In the matter  
of  
COWARD.*Ex parte*  
CLARKSON.In the matter  
of  
FEAR.

put the partnership effects in the ordering of *Mallam*, when, by the terms of the notice, the hand which is to receive the partnership debts is the very hand to apply them in satisfaction of the demands against the partnership; and *ex parte Wilson, Buck*, 48, is to the same effect.

## THE CHIEF JUDGE:—

This is, in effect, a claim by the creditors of the three to have property which once belonged to the three distributed among the creditors of the three; and the answer is, that one of the three — *Moore* — assigned his share of the partnership assets to the other two in 1833.

It is clear, and not disputed, that the creditors of the three had no lien on the partnership property, and their only right is through *Moore*. The question then becomes, What equity had *Moore*? If the agreement had been executory until payment of the 500*l.*, *ex parte Wheeler, Buck*, 25, would have been conclusive. But was there or not in this case an absolute disposal of the property by *Moore*? The two *Cowards* had possession of the goods, and the consideration was, 50*l.* in money, and five bills of 100*l.* each. Though the giving the bills was security and not payment, yet it prevented the agreement being executory. In *ex parte Wheeler, Buck*, 25, the payment was to be antecedent, which was not the case here. All parties considered the payment of 50*l.* in money, and the delivery of the five bills, as being all required to be done to fulfil the agreement and complete the transfer; consequently the separate creditors of *Moore* have no equity attaching through him on the property in question.

Sir *John Cross*:—*Moore* actually transferred his share, and there was neither an express nor an implied contract that *Moore* should have any lien, or that the



*Cowards* should be trustees for himself or his creditors. The parties conceived the 50*l.* and the five bills to be an adequate consideration. The contract was entire and completely executed, consequently the petitioners have no interest in the property in question.

Sir George Rose:—

It has been long settled, that a partner, on dissolution of partnership, and even on the eve of bankruptcy, may dispose of his share of the partnership property. The reason of this is given by Lord *Eldon* in *ex parte Williams*, 11 *Ves.* 3, viz. that creditors have no specific lien' on the partnership property. This has been considered hard upon the creditors, and Courts have struggled much to preserve the property for them; and in such cases as this, if the transaction be incomplete at the bankruptcy, or there be any equities remaining in the outgoing partner, the Courts gladly avail themselves of such circumstances in order to preserve the property for the creditors. Had any thing remained executory in this case the Court would have taken advantage of the fact, but the agreement transferred the property, and conferred no equities on the creditors as against that transfer.

It is quite immaterial how the arrangement here was carried into effect, whether by an actual assignment or an agreement to assign. Want of notice to the creditors has occasionally been considered, in cases resembling the present, as letting in the reputed ownership. The mode of payment was principally by bills of exchange, and it is said, that if *Moore* had continued solvent, the nonpayment of any one of these would have remitted him to his rights against the *Cowards*, so as to entitle him to an account; and that when he took the bills, he did no more than secure to himself the means of more

1834.

*Ex parte*  
GIBSON.  
In the matter  
of  
COWARD.  
*Ex parte*  
CLARKSON.  
In the matter  
of  
FEAR.



1834.

—  
*Ex parte*  
 GIBSON.  
 In the matter  
 of  
 COWARD.  
*Ex parte*  
 CLARKSON.  
 In the matter  
 of  
 FEAR.

readily enforcing payment, and that the bills were mere security. How far that argument would be valid, and how far such lien would exist if the property in question were real estate, has never been sufficiently adverted to ; but, however that may be, the question does not arise in this case. It is impossible here to say that the bills give any specific lien on the property.

Suppose an action had been brought against the *Cowards* by creditors of theirs, and execution had issued, and all the property had been taken, could *Moore* have stepped in and said, “ This property is mine ; it has not passed from me ; the bills not having been paid, your execution is not valid until an account has been taken, and I have been paid.” It appears to me that *Moore* would have no such right.

The order made by the Court was, declare the stock and property, &c. of “ *Cowards* and *Moore* ” became that of *Henry Coward* and *James Coward*, except as to book debts due to “ *Cowards* and *Moore* ” on the 10th August 1833, in respect of which no notice was given to the debtors of the agreement of dissolution before the bankruptcy. And it was referred to a deputy registrar to inquire what joint debts were owing by “ *Cowards* and *Moore* ” on the 10th of August, and to determine under which of the above fiats it would be most beneficial to the parties that this order should be executed ; and separate accounts were to be kept, and the estates administered among the several joint and several creditors accordingly. The costs of *Clarkson*, and of the petitioning creditor under *James Coward*’s separate fiat, to be paid by *Clarkson* ; each other party’s out of their own estates. (a)

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(a) This order was not however drawn up, and on a subsequent day the parties took a different order by consent.



*Ex parte* LAVENDER.—In the matter of  
LAVENDER.

C. R.  
Sept. 15,  
1834. (a)

**THIS** was a petition by the bankrupt to supersede the fiat, because, among other reasons, there was no act of bankruptcy.

The act of bankruptcy on which reliance was placed was an absenting, by not attending an appointment.

*Lavender* had for some time been in treaty for the loan of a sum on mortgage. Considerable delay took place in completing the negotiations. Pending these negotiations a bill of *Lavender's* became due, on which an application was made by the attorney of the holder for payment. *Lavender* immediately waited on the attorney, and communicated to him the probability that the negotiation for the loan would soon be completed, and he would then pay the money without any delay, and he told the attorney that he should directly go — and he did go — to London to accelerate the loan. That, after considerable progress had been made in the negotiation, and which was on the eve of being concluded, he returned to the country, when he learned, to his astonishment, that a writ had been issued against him on that bill, and was in the hands of the sheriff's officer, to whom he went immediately, and surrendered himself. The drawer of the bill became bail to the sheriff, and *Lavender* said to him, and to the attorney of the holder, that he would attend on the next day for the purpose of giving security. After he was liberated, it occurred to

A country trader having been arrested on a bill, and having put in bail, promised to attend next day to pay the same; he, however, went to London to procure funds, and wrote to the creditor, that that would prevent his keeping the appointment:— Held not an act of bankruptcy by absenting, there being no intent to delay.

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(a) Special sittings before the Chief Judge only. This case is already reported, *ante* vol. i. p. 699; but it has been suggested to the reporters that it is expedient to report the point of the act of bankruptcy.



1834.

*Ex parte*  
LAVENDER.  
In the matter  
of  
LAVENDER.

him that it would be more expedient to go to London immediately, and obtain the money which was undertaken to be advanced on mortgage. He immediately went to London, and upon his arrival instantly wrote to the solicitor of the arresting creditor, stating, that in consequence of his exertions to procure the money, he should not be able to keep his appointment to attend and give the security on that evening, but that he hoped to receive the money, and attend with it in the course of that or the ensuing day. He, however, remained in London, and exerted himself to the utmost to procure the money. The title had been approved, and the money was about to be paid, when a fiat in bankruptcy was issued against him.

Mr. *Serjeant Wilde* and Mr. *Montagu*, for the petitioner, contended that this was not an act of bankruptcy. *Schooling v. Lee*, 3 *Stark*. 149, which was the first case on the subject, was very similar to the present; the deposition to prove the act of bankruptcy was by a sheriff's officer, who stated that he arrested the bankrupt, but, on a promise that he would execute a bail-bond, released him; that he did not attend to execute the bail-bond; and *Abbott*, C. J., said the party absented himself, not to avoid a creditor with whom he had made an appointment, but merely to avoid the execution of a bail-bond. The next case is *Tucker v. Jones*, 2 *Bing*. 2, S. C., *Toleman v. Jones*, 9 *Moore*, 24, where the deposition stated that the deponent called at the house of the bankrupt, who then promised to meet deponent next day at the office of the solicitors for deponent's employers, in relation to his giving security for a debt then owing by him to deponent's employers, and that he and his employers attended accordingly, but the bankrupt did not attend the ap-



pointment. No other proof being offered, a nonsuit was directed, the deposition not containing any statement of the bankrupt having absented himself with a view to delay creditors.

In *Key v. Shaw*, 1832, 1 *Moore & Scott*, 462, the same doctrine is recognized. Mr. Justice *Park* said, “ There was one point urged in argument to which I do not accede, viz. that a failure to keep an appointment made with a creditor constitutes an act of bankruptcy.” In *Robson v. Rolls*, 1833, 9 *Bing.* 648, it was held that a debtor who stopped at the end of Chancery Lane till he heard that a writ had not issued against him, did by such stopping commit an act of bankruptcy, the law being, that the breaking an appointment to meet creditors is an act of bankruptcy when it is broken with intent to delay the creditors, which was manifested in this case by his stopping at the end of Chancery Lane until he was apprized whether he might safely proceed. This doctrine has lately been recognized, and the law confirmed, in *Robinson v. Carrington*, 1 *Mont. & Ayr.* 13; and in the present case the fact was clear, that he absented himself, not to delay but to benefit the creditor, by paying him the money instead of giving him security.

Mr. *Temple*, *contrà*, cited *Dickenson v. Foord, Barnes*, 160, which was as follows: A point was reserved at Nisi Prius, and a case made for the opinion of the Court, whereby it was stated, that *A. B.* (against whom a commission of bankrupt had issued, under which an assignment of his effects had been made to plaintiff,) having been arrested, and the sheriff’s officer having taken his word to put in bail, kept at home, and declared he did so to avoid the consequences of the former arrest. The question was, Whether this was an act of bankruptcy or

1834.

—  
*Ex parte*  
LAVENDER.  
In the matter  
of  
LAVENDER.



1834.  
 —  
*Ex parte*  
 LAVENDER.  
 In the matter  
 of  
 LAVENDER.

not? The Court thought this to be a plain act of bankruptcy. The intent to defraud his creditors would not have been sufficient to make this man a bankrupt without doing the act, *i. e.* keeping at home; but he kept house, and declared with what intent. The intent need not be put in execution; the question is *quo animo* he kept house; he himself did the overt act, and declared his intent.

Mr. *Serjeant Wilde* in reply:—This case is in confirmation of the Court of Common Pleas in *Robson v. Rolls*, 9 Bing. 648.

*Erskine*, C. J.:—This is a mere question of fact, with what intent did he absent himself? The fact of absenting is clear in all the cases, the only question being the intent. In those cases where there is no evidence of intent to avoid creditors it is not an act of bankruptcy; but in the cases where there is such intent, as in *Robson v. Rolls*, 9 Bing. 648, and *Dickenson v. Foord, Barnes*, 160, where there is such intent, it is an act of bankruptcy. In the present case it has been clearly proved that, to say the least, there was no intent to delay the creditor; I am satisfied, therefore, that it is not an act of bankruptcy; the fiat must, therefore, be superseded, with costs. (a)

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(a) See *Robinson v. Carrington*, 1 Mont. & Ayr. 13. S.C. 1 Mylne & Keen, 555.



*Ex parte* LEE. — In the matter of LEE.

THE bankrupt had been committed by the commissioners for not answering to their satisfaction.

On a former day Mr. *Montagu* obtained a rule, that the assignees should show cause why a writ of habeas corpus should not be issued, and the bankrupt brought up thereon to be discharged. On this day cause was shown against the rule by Mr. *Ayrton*. (a)

Baron *Alderson* :— The habeas corpus must issue, and the prisoner must be discharged. Many of the answers are certainly of such a nature as to appear at first unsatisfactory, but the commissioners did not sufficiently press these points; if they had pressed them, the bankrupt might have placed them in a more satisfactory view. The commissioners should have pointed out to the bankrupt the particulars wherein they were dissatisfied, then, perhaps, he might have reconciled what they conceived to be contradictions, and have supplied what to them appeared omissions. At present these examinations have more the appearance of cross-examinations by adverse counsel, than of what should be the examination of commissioners. The commissioners may, however, if they please, summon the bankrupt before them again, previously informing him of the points as to which he is to be examined, allowing him to inspect his books; but he is now entitled to his discharge, and let him be discharged.

Habeas corpus ordered to issue. (b)

Before  
Mr. Baron  
*Alderson*,  
Sept. 20,  
1834.

To justify a committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers, and press those points.

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(a) This course saved the expense of issuing the habeas corpus in the first instance.

(b) It was, however, agreed between the parties that the expense of the writ, &c. should be saved, and the bankrupt discharged. A single question fol-



C. of R.  
Nov. 3,  
1834.

On the sale of equitable mortgage, the right to the rents accrues from the date of the order of sale.

*Ex parte* BIGNOLD. — In the matter of POSTLE.

**T**HIS was a petition by an equitable mortgagee for the usual order for sale, and for the rents and crops, &c. from the time of the bankruptcy. The crops, &c. had been sold, and the money awaited the decision of the Court.

lowed by a direct answer, when the question is unvaried in terms, and not followed by any further examination respecting the transaction which may have excited the suspicions of the commissioners, cannot support a commitment.—*Walker's case*, 1 *Gl. & J.* 371. If the commissioners propose the following question, "Have you not at two different periods, and both six months previous to the issuing forth of this commission, executed two different conveyances of your estate and effects, or part thereof, to your son?" to which the bankrupt answered, "Not to my knowledge," and no further question is proposed, the answer is satisfactory. If to the following question, "Is the above all the account you can or will give of this 200*l.*, which you admit you have received?" the bankrupt answers, "It is the only account I can give," and the commissioners do not propose any further questions, the answer is satisfactory.—*Norris's case*, 2 *Jac. & Walk.* 437. If the commissioners commit upon answers to

collateral questions which the witness has difficulty in answering, when they may propose questions leading to the same conclusion, which the witness may be more reasonably expected to answer, the prisoner is, as it seems, entitled to his discharge.—*Ex parte Baxter*, 7 *Barn. & Cres.* 674. A commitment is defective if the commissioners do not examine with sufficient minuteness.—*Hooton's case*, 2 *Gl. & J.* 215 To justify a committal by the commissioners it is not enough that the first answer or statement of the bankrupt is unsatisfactory; he should be further sifted, and the examination brought to that point, that the warrant of committal shall exhibit the bankrupt's obstinate refusal to give a satisfactory explanation to the unsatisfactory answer; and the commissioners not having done this, the prisoner was discharged by *Hart*, L. C. *Ex parte Fitzhenry, Molloy*, 35. And see the judgment of Lord *Eldon* in *ex parte Oliver*, 1 *Rose*, 414, to the same effect.



Mr. *O. Anderdon* for the petition : — The question is, From what time the mortgagee is entitled to the rents and crops? The mortgagee happens to be the same person who petitioned in *ex parte Bignold*, 2 *Dea. & Ch.* 398. The claim is from the time of the bankruptcy, by analogy to a late case, in which the Lord Chancellor decided that a legal mortgagee is entitled to emblements from the time of his declaration in ejectment.

1834.

*Ex parte*  
BIGNOLD.

In the matter  
of  
POSTLE.

Mr. *Walker* for the assignees : — The petitioner is certainly not entitled from the bankruptcy. The question is, Whether from the time of presenting his petition, or from the date of the order of this Court? In *ex parte Bignold*, 2 *Dea. & Ch.* 298, Mr. *Montagu*, for the assignees, consented to the order made, consequently that case left the point open. The cases before *ex parte Bignold* are contradictory : *ex parte Bignold*, 2 *Gl. & J.* 273, decided it was from the time of presenting the petition ; *ex parte Alexander*, 2 *Gl. & J.* 275, from the time of sale. There is no principle why the equitable mortgagee should receive the rents till he reduce the premises into possession. If an equitable mortgagee file a bill for a receiver, he is allowed the rents from the date of the order only.

Mr. *O. Anderdon* in reply : — The petitioner is entitled from the time of his petition at least, for a receiver would be appointed the instant an application was made on affidavit. In legal mortgages the party is entitled from the day of service of the writ of ejectment ; in equitable mortgages, by analogy, from the time of presenting the petition. If the date of the order alone regulates the time, then the accidental circumstance that this petition was not heard before the long vacation will deprive the party of the rents during that period.



1834.

*Per Curiam* : —

*Ex parte*  
BIGNOLD.  
In the matter  
of  
POSTLE.

No case gives the right to the rents, &c. further back than the order for sale, except *ex parte Bignold*, 2 Gl. & J. 273. Lord *Eldon* appears to have thought that the remotest date was from the time of sale, and doubted whether it should be so early in bankruptcy.

The time should be from the date of the order of sale, by analogy to the practice in Chancery on the appointment of a receiver.

Ordered from date of order.

C. of R.  
Nov. 4,  
1834.

*Ex parte* FOX. — In the matter of FOX.

An order of committal for nonpayment of costs, under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into Court.

THIS was a motion to suspend an order for costs, for nonpayment of which the party was under commitment. The ground of the motion was the pendency of an appeal against the order. The applicant was not prepared to pay the taxed costs into Court.

Mr. *Twiss* for the motion.

*Per Curiam* : — As the party does not pay the costs into Court, the motion must be dismissed with costs.

C. of R.  
Nov. 3,  
1834.

*Ex parte* HUNT. — In the matter of FOX.

An attachment for payment of costs is of course after disregard of the four-day order, but, unless ex necessitate, will not be issued in vacation.

MR. *J. P. COBBETT* moved for an attachment for nonpayment of costs, the four-day order having been issued and disregarded.

THE CHIEF JUDGE : —

This is an order quite of course. An application for this order was made to me in vacation ; but as an attach-



ment does not issue in any other court during vacation, I saw no reason why it should in this Court.

If indeed it were alleged the party were about to abscond, or other strong reason were given, I would let the attachment issue in vacation, not otherwise.

1834.

*Ex parte*  
HUNT.  
In the matter  
of  
Fox.

*Ex parte* ANNANDALE. — In the matter of  
CURTIS.

C. of R.  
Nov. 4,  
1834.

A FIAT issued against the bankrupt on the 21st of January 1834, under which the petitioner, who was the son-in-law of the bankrupt, proved an annuity.

An annuity may be valued, though no price were given for it. Cross, J. *semb. dissent.*

This annuity was granted under the following circumstances: — The petitioner, being about to marry the bankrupt's daughter, required some portion, declining otherwise to marry; on which the bankrupt sent the following letter, on the faith of which the marriage took place: —

What is sufficient evidence of a marriage contract to entitle the party to prove.

“ My dear Sir,

Dec. 23, 1829.

“ The subject we were conversing on this morning has occupied my most serious consideration. As I informed you, it is not convenient to me to give you a sum of money at this present time; but as you are desirous of settling, I promise you, until it is convenient to me to do something better for you, to allow my daughter 100*l.* a year, which you can have as you require, and I think this will be equally advantageous to you. The amount of the annuity left to Jane [the daughter] by her late kind friend, I have, and will in some way dispose of to your mutual benefit. I shall feel great pleasure in assisting you all in my power in the furnishing your house, and I will consult with you as to what you may require.

“ Mr. Thomas Neale.”

“ THOMAS CURTIS.”



1834.

*Ex parte*  
ANNANDALE.  
In the matter  
of  
CURTIS.

The proof was resisted before the commissioner, on the grounds that no sum was ever paid on account; that there was no evidence of the letter having been written at the time it purported to bear date; that other transactions between the parties were so suspicious, that the evidence of the parties alone ought not to be credited; and that the annuity was not one on which the commissioner could put a value. The commissioner, however, allowed a proof for 1,062*l.*, the valuation of an actuary on the bankrupt's age of fifty-seven years, but stated that the importance of the question justified the assignees in taking the opinion of the Court of Review.

This was a petition presented by the assignees accordingly to expunge the proof.

Mr. Bethell: —

1st, The letter was not written till after the bankruptcy.

2d, Originally only the arrears of annuities were proveable, unless secured by a bond, with a penalty which had become forfeited before the bankruptcy. (a) This was altered by the 49 Geo. 3, c. 21, section 17 of which enacted, that any annuity, however secured, might have a value set upon it. That act, however, was repealed by 6 Geo. 4, c. 16, under the 54th section of which act the annuitant now claims. That clause enacts, that “any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard

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(a) *Ex parte Le Compte*, 1 Atk. *Penkins v. Kempland*, 2 Black. 215; *ex parte Belton*, 1 Atk. 251; Rep. 1106.  
*ex parte Burrow*, 1 Bro. 268;



being had to the original price given for the same annuity." In *ex parte Saxe*, *Mont. & Bli.* 134, S. C., 2 *Dea. & Ch.* 172, it was held, that an annuity in consideration of a business was not within this clause, as there was no "*original price*," but that the valuation must be made as it would have been before the 49 Geo. 3, c. 121. In *ex parte Saxe* there was no difficulty, as there was a bond forfeited before the bankruptcy.

1834.  
—  
*Ex parte*  
ANNANDALE.  
In the matter  
of  
CURTIS.

In the present case the consideration was not money; therefore, following *ex parte Saxe*, it is not proveable within the 6 Geo. 4, c. 16, s. 54; and as there was no bond, only the arrears at the bankruptcy can be proved; the value cannot be proved. Even if it were within the 6 Geo. 4, c. 16, the letter under which the claim is made is far too vague. It cannot be ascertained whether the bankrupt intended to grant an annuity for his own life, for his daughter's life, or that of her husband.

Mr. *Swanston* and Mr. *Montagu*, *contra*, argued that this was within the 54th clause of 6 Geo. 4, c. 16, and cited *ex parte Sitger*, *Mont.* 100, where the letter was almost *verbatim* the same, and it was held proveable.

THE CHIEF JUDGE: —

This annuity rests entirely on the letter; and three questions arise. 1st, Whether it is genuine, or written after bankruptcy to give a preference? On this I feel no doubt that it is genuine, and sent at the time it bears date. 2d, Whether any and what construction can be put on the letter? and, 3d, Whether the annuity be proveable within the act?

2d, As to the wording of the letter, it might mean during his own life, or during the lives of himself and daughter. In *ex parte Sitger*, 1 *Mont.* 100, the words



1834.

—  
*Ex parte*  
 ANNANDALE.  
 In the matter  
 of  
 CURTIS.

are rather stronger, being “for her own use.” I am of opinion the bankrupt intended to grant an annuity for the joint lives of himself and daughter.

3d, The 56th section is compounded of two distinct enactments; 1st, that any annuity may be proved; 2d, that the commissioners are to have regard to the original price. If there be no price, as here, it is a *casus omissus* in the act, and the commissioners must compute the value in some other way.

The 54th section of 6 Geo. 4, c. 16, is copied from the 17th section of 49 Geo. 3, c. 121, adding the words, “regard being had to the original price,” &c. But these words do not exclude annuities not within that part of the clause. The value of this annuity to be proved is what an actuary states to be that of an annuity for the life of the father and daughter.

Sir John Cross: — I have confined my attention to the question, whether the letter were sent at the time it bears date? On that I wish for further investigation.

The bankrupt, being in insolvent circumstances, grants an annuity of 100*l.*, but, in another transaction, he and his son-in-law endeavoured fraudulently to transfer certain property to the latter. The commissioner was so doubtful as to his decision that he recommended an appeal to this Court. The assignees challenge the sufficiency of the evidence in support of the proof. No further evidence is adduced, nor is it stated why not. The petitioner is convicted of fraud in one transaction, and produces no further evidence in this. I think, therefore, he ought to be examined *viva voce*. There is no entry in any of his or the bankrupt's books as to this transaction, and yet the bankrupt is a man of business, and so is *Neal*. I therefore wish to have



further investigation, and am unprepared at present to give any opinion on the merits.

1834.

Sir George Rose concurred in the order.

*Ex parte*  
ANNANDALE.  
In the matter  
of  
CURTIS.

Petition dismissed. Costs of both parties out of the estate.

*Ex parte* THOMAS MABERLEY. — In the matter of YOUNG.

C. of R.  
Nov. 5,  
1834.

MR. SWANSTON: — In this case the petitioner tendered a proof of debt on a bill of exchange. He sent an affidavit, stating that he was “indorsee for a valuable consideration.” The commissioners rejected the proof, on the ground that the deponent had not stated what consideration had been paid. This is a petition to prove, and an affidavit in support, setting forth the consideration.

An affidavit in support of a deposition of proof on a bill must state the consideration.

If a defective affidavit be produced, the commissioner should not reject, but adjourn the proof.

The assignees did not appear.

*Per Curiam*: — The affidavit in support of a proof on a bill should state the consideration fully, as “full value thereof,” or as the fact may be. Such an affidavit is now produced. The commissioner should not have rejected this proof because the affidavit tendered was defective; he should have required further evidence, and have adjourned the proof.

Sir John Cross: — The party may have been misled by *Archbold's* form, which is “an indorsee,” without stating what consideration. *Cooke's* form is different.



1834.

*Ex parte*  
MABERLEY.  
In the matter  
of  
YOUNG.

Proof ordered. Declared to be entitled out of the assets in hand to a dividend equal to any dividend declared. (a) Petitioner to pay costs of petition, and of any further meeting which may be necessary. Assignees' costs out of the estate.

C. of R.  
Nov. 5,  
1834.

The affidavit on a motion for substituted service must state that the party wilfully keeps out of the way to avoid service, and is not to be found.

*Ex parte* BLANDY. — In the matter of FORSTER.

AN order had been made that an assignee should elect within fourteen days after personal service.

Mr. *Swanston* applied for an order to direct that substituted service might be good.

*Per Curiam*: — The affidavit in support of such a motion ought to state that the party wilfully keeps out of the way to avoid service, and is not to be found.

C. of R.  
Nov. 5,  
1834.

The Court will only interfere to order the sale of equitable mortgages in cases where there is no dispute.

Legal mortgage of equitable estate, within Lord Loughborough's order.

*Ex parte* ATTWOOD, SPOONER, and Co. — In the matter of JACKSON.

MR. *GREEN*: — This is a petition for a sale of an equitable mortgage.

THE CHIEF JUDGE: — This is a legal mortgage of an equitable estate; it was therefore unnecessary to come to this Court.

Mr. *Piggot* for the bankrupt (who appeared though not served): — This is the petition of *Attwood* and other

(a) An interim order had been made in vacation, that the assignees should reserve a sum sufficient to answer the petitioner's claim.



partners. *Spooner*, one of the partners of *Attwood* and Company, was the partner of the bankrupt, and the sum for which the equitable mortgage was given was due from the partnership of *Spooner* and *Jackson* to *Attwood* and Company, consequently the petitioners ought not to claim the whole debt. The property was the bankrupt's. Under these circumstances the bankrupt asks that the petition may stand over to give him an opportunity to file a bill in the name of his assignees, giving them an indemnity.

1834.

—  
*Ex parte*  
ATTWOOD  
and others.  
In the matter  
of  
JACKSON.

Mr. *Green* in reply stated that the fact was denied, and the petitioner deposed that the debt was the separate debt of the bankrupt.

Sir *George Rose* : — Still there being a dispute throws a doubt on the case, and this Court only interferes as to mortgagees in clear cases. The better way of proceeding will be, that the parties should consent to an order for the sale, and to let the dividends be paid into Court, subject to the question in dispute. By this course the bankrupt, now an objecting party, will join in the conveyance, and obviate a heavy objection to title. That this is a separate deposit for a joint debt does not vary the petitioner's right to a sale of the deposit; but the bankrupt certainly should be allowed to use the names of the assignees to work out any equities he may have. The bankrupt may petition for an injunction to prevent the assignees paying over the money to the petitioners, if he choose to run that risk. The objection taken might prevent any proof against the joint estate.

Ordered, That the proceeds be paid into Court, the petitioner submitting to the jurisdiction of the Court as to the disposition of the proceeds.



1834.

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*Ex parte*  
 ATTWOOD  
 and others.  
 In the matter  
 of  
 JACKSON.

Mr. *Montagu* asked that the petitioner might pay the costs, this being a case in which the order might have been made by the commissioner. The Court have so decided in a late case not yet reported.

THE CHIEF JUDGE : — There is such a decision ; but in this case the costs of the petition, and of all parties served, may come out of the proceeds.

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C. of R.  
 Nov. 5,  
 1834.

If both parties agree, a *vivâ voce* examination may be had of course.

If affidavits have been filed on both sides, the Court will read them in the first instance.

If a *vivâ voce* examination be desired by the petitioner, he should state facts on his petition to show the necessity, and make a preliminary application.

*Ex parte* DUGARD. — In the matter of AUGHTIE.

MR. *Twiss* and Mr. *Bacon* for the petition, to expunge a proof, moved that a *vivâ voce* examination might be had on the hearing of the petition.

Mr. *Swanston* and Mr. *Montagu*, *contrâ*.

*Per Curiam* : — If both parties agree, a *vivâ voce* examination may be had of course. If one party resist, then the expense of that mode of proceeding should be considered, which very nearly equals a trial at *Nisi Prius*. In this case affidavits have been filed on both sides. Under that state of circumstances we will first hear the affidavits ; and, if they leave any doubt in the minds of the Court, then the Court will hear *vivâ voce* testimony. In this case the petitioner appears to have depended on the affidavits up to this moment. If a petitioner thinks his case cannot be heard fairly without a *vivâ voce* examination, he should state facts on the face of his petition to show that course would be useful, and pray accordingly ; and then, on the footing of that, a preliminary application may be made for a *vivâ voce* examination.



*Ex parte* DUGARD.—In the matter of AUGHTIE.

C. of R.  
Nov. 6,  
1834.

THIS day the petition was called on.

Mr. *Twiss* and Mr. *Bacon* for the petition again pressed for a *vivâ voce* examination.

In the present case justice cannot be done unless witnesses be examined *vivâ voce*. The commissioner thought the case so doubtful, that though he admitted the proof, he ordered the successful creditor to pay costs. In a case thus avowedly of doubt this Court cannot decide on the inferior evidence of affidavits.

If both parties agree, a *vivâ voce* examination is of course; if they do not, the party asking must show cause.

Mr. *Swanston* and Mr. *Montagu*, *contra*, contended that the rule was, that when affidavits had been filed a *vivâ voce* examination was not to be ordered, unless the Court, on reading the affidavits, thought justice could not be done without such examination.

THE CHIEF JUDGE : — As the commissioner has decided in favour of the proof, the petitioner seeking to expunge must show probable reason, that, if witnesses be examined *vivâ voce*, the testimony on which the commissioner has decided would be reversed. But if the commissioner had rejected the proof, and the creditor had sought a *vivâ voce* examination, I should have called on him to show cause in the same manner.

Sir *John Cross* : — The commissioner states on the proceedings, that he came to this decision reluctantly, and was doubtful. The witnesses were examined before him *vivâ voce* ; and how, in such a case, can this Court decide on the inferior evidence of affidavits ? I am of opinion the witnesses should be examined *vivâ voce*.



1834.

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*Ex parte*  
DUGARD.  
In the matter  
of  
AUGHTIE.

*Sir George Rose* : — If both counsel agree, a *viva voce* examination may be had as of course ; if only one asks, and the other denies, then the party asking must show cause to induce the Court to grant what he asks. The expense must never be lost sight of. Besides, a counsel might press on the Court the necessity of a cross-examination, which might be had at great expense, and after all the question turn out to be one of law, as nineteen out of twenty appeals from the commissioners are.

*Per Curiam* : — The petitioner must prove to the Court the necessity or expediency of the course now asked to be pursued.

*Mr. Twiss* and *Mr. Bacon* then proceeded accordingly.

The claimant stated that he had lent sums to his brother, and tendered a proof for such sums. He was asked, How did you procure funds ? He answered, By sums borrowed, and by profits of trade. The commissioner adjourned the proof, to enable the claimant to adduce evidence of that fact ; but, on coming again before the commissioner, he produced evidence of other modes by which he became possessed of the money.

*Mr. Swanston, contra.*

*Per Curiam* : — Enough has now been stated to induce this Court to think a *viva voce* examination expedient, and let there be one accordingly.

*Viva voce* examination ordered.



*Ex parte* TOWN. — In the matter of BROWN.

C. of R.  
Nov. 5,  
1834.

**MR. J. P. Cobbett** : — This is a petition by the solicitor to the fiat, that he may have leave to bid at the sale of part of the bankrupt's property. The assignees have been served, and do not appear to oppose.

The solicitor to the fiat cannot have leave to bid at a sale of the bankrupt's property, unless under very peculiar circumstances.

*Per Curiam* : — The Court never will make the order prayed, unless there be very peculiar circumstances, as that the solicitor is mortgagee. Allowing him to bid would render it his interest to undervalue the property. No peculiar circumstances being stated here, this petition must be dismissed. (a)

*Ex parte* COLLYER. — In the matter of COWELL.

C. of R.  
Nov. 5,  
1834.

**MR. O. ANDERDON** : — This is a petition by a servant for an allowance of six months' salary in full, and to prove for the remainder, under 6 Geo. 4, c. 16, s. 48. (b)

To entitle a servant to an allowance of six months' wages in full, the hiring need not be for a year.

The petitioner was the overlooker or manager of a cotton mill, engaged at 33s. per week; subsequently a contract was entered into that he should be paid 104l.

(a) See *ex parte Bennett*, 10 Ves. 38; *ex parte James*, 8 Ves. 337; *Campbell v. Walker*, 5 Ves. 681; *ex parte Edwards*, 6 Ves. 3. ful for the commissioners, upon proof thereof, to order so much as shall be due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last-mentioned amount.

(b) That when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt in respect of the wages or salary of such servant or clerk, it shall be law-



1834.

per year, to be paid in weekly sums. The commissioner had refused the six months' wages in full.

*Ex parte*  
COLLYER.

In the matter  
of  
COWELL.

Mr. *Swanston* : — The service must be yearly. *Ex parte Skinner, Mont. & Bli. 417.*

*Ex parte Skinner, Mont. & Bli. 417, corrected.*

THE CHIEF JUDGE : — That case is wrongly reported. None of the Judges used any such expression as that the hiring must be yearly. All that the Court said was, that there must be some engagement of a more permanent nature than a weekly hiring.

Sir *J. Cross* : — A yearly hiring is strong evidence of an engagement for continued service; a weekly hiring very weak evidence, or none at all. Here the evidence of permanent service is strong. The Court should be cautious in extending this clause. The owner of a cotton mill might hire 1,000 servants by the year, and their wages sweep away all the assets.

Sir *George Rose* concurred, and said, There is not any general rule on these occasions as to what hiring is sufficient; none can safely be laid down.

Ordered, with costs, out of the estate.

C. of R.  
Nov. 5,  
1834.

The certificate cannot be stayed for misconduct before the fiat issued.

*Ex parte GORDON.* — In the matter of CASTELL.

MR. *BICHNER* : — This is a petition to stay a certificate for fraudulent conduct by the bankrupt before the issuing the fiat; viz. having received money for the purchase of prints, which he misapplied.



*Per Curiam* :— In order to stay the certificate, the misconduct must be subsequent to the issuing the fiat. (a)

Petition dismissed, with costs. (b)

1834.

*Ex parte*  
GORDON.  
In the matter  
of  
CASTELL.

*Ex parte* STEPHENS.—In the matter of  
STEPHENS.

C. of R.  
Nov. 6,  
1834.

**T**HIS was the usual petition of an equitable mortgagee for a sale and leave to bid, &c.; it also asked that the petitioner might be allowed out of the proceeds of sale the costs of successfully defending an extent in aid, and to be excused from paying a deposit; both of which the Court refused.

An equitable mortgagee is not entitled to the costs of defending an extent in aid, or to be excused from paying a deposit.

Mr. Bacon for the petition.

Mr. Swanston for the respondents.

*Ex parte* GREEN.—In the matter of ARMISTEAD.

C. of R.  
Nov. 6,  
1834.

**T**HIS was a petition to stay the certificate. In 1816 a commission issued against the bankrupt, under which he paid no dividend. In September 1833 a fiat issued against him, under which he paid no dividend. In October 1833 his last examination was adjourned *sine die*. In April 1834 he passed his last examination, and the certificate was advertised for allowance. The peti-

If there have been two commissions, and no dividend, it is in the discretion of the Court to allow or refuse the certificate.

(a) See *ex parte Gardner*, 1 Ves. & Bea. 45, S. C. 1 Rose, 379; *ex parte Joseph*, 1 Rose, 379; *Stapleton v. Macbar*, 7 Taunt. 509; *Walker v. Giblet*, 2 W. Bl. 811.

(b) *Quære*. Ought commissioners of bankrupt to possess

some such power, as to misconduct before the fiat issues, as is now possessed by the commissioners of the Insolvent Court as to misconduct of the bankrupt before filing his petition?

A creditor who has not proved, and who takes the bankrupt in execution, and petitions to stay the certificate, must elect whether he will abandon the action or the petition.



1834.

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*Ex parte*  
 GREEN.  
 In the matter  
 of  
 ARMISTEAD.

tion charged that the last examination was allowed to pass, and that the certificate was signed in consequence of the bankrupt having given security to the creditors for payment of their debts. The petition contained other charges, as that the fiat was a friendly one, &c. The affidavit in reply stated, that the last examination was passed, and the certificate signed, to enable the bankrupt the better to carry into effect an arrangement then entered into by the assignees with consent of the creditors, that the bankrupt should have the management of a theatre at Liverpool, part of his estate, for the benefit of his estate. The petitioner had not proved, and the bankrupt had been taken in execution at his suit, bailed, and rendered by his bail the day before the petition was heard. That part of the affidavit in support, which related to the signature of the certificate for money stated, that “the petitioner had been informed, and believed, the bankrupt denied the fact.”

Mr. *Swanston* for the bankrupt: — The petitioner, having the bankrupt in execution, must elect, either to discharge the bankrupt, or have the petition dismissed. *Ex parte Bostock*, 1 *Dea. & Ch.* 383. (a)

Mr. *Ayrton*, *contra*: — In *ex parte Bostock* the petitioners had proved, which is not the case here.

*Per Curiam*: — That makes no difference. In *ex parte Bostock* the creditor sought relief under the fiat by proving; in this case the petitioner also seeks relief under the fiat, viz. staying the certificate.

The petitioner elected to discharge the bankrupt.

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(a) *Quære, tamen.*



*Per Curiam* :—As the affidavit in support of the charge of giving security to the creditors only states information and belief, that part of the petition must be abandoned.

1834.

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*Ex parte*  
GREEN.  
In the matter  
of  
ARMISTEAD.

Mr. *Ayrton* : — There having been a commission and a fiat, and no dividend paid under either, the Court has a discretion to refuse the allowance of the certificate. *Ex parte Cunningham*, note, 4 P. Appendix, 2d edit., *Mont. B. L.*; *ex parte King*, 11 *Ves.* 426.

Mr. *Swanston*, in reply, was stopped.

*Per Curiam* : — The cases cited show that there is a discretion in the Court to stay the certificate if no dividend has been paid, but there are not in this case any circumstances to induce the Court to exercise that discretion. Conduct, proving that the fiat is the bankrupt's, may be good ground to supersede, in order to prevent the operation of the certificate (a); but it is not alone enough to enable the Court to stay the certificate.

Dismissed, with costs.

*Ex parte* REAY. — In the matter of CHAMPION.

C. of R  
Nov. 6,  
1834.

CHAMPION was indebted to *Reay* in 7,000*l.* on bills of exchange. A fiat issued against *Champion* in 1831, under which *Reay* proved. In 1833 *Champion* proposed a composition to his creditors under the fiat. *Reay* agreed to accept as a composition 1,750*l.* by instalments, secured by bills payable at different periods, and the assignment of a bond for 3,000*l.*, the obligor to

A composition creditor, who receives a bond as part of the composition, is, when the old debt revives, entitled to retain the bond, on a question of proof.

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(a) *Ex parte Smith*, *Mont.* 11.



1834.

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*Ex parte*  
 REAY.

In the matter  
 of  
 CHAMPION.

which was a third party. A composition deed was accordingly executed by *Reay*, containing a proviso, that if the instalments were not duly paid the deed should be void. Only 250*l.* was paid under this deed. The bill for the first instalment was dishonoured. *Reay* then proceeded at law against *Champion* for the amount due to him; and in 1834 a second fiat issued against *Champion*. *Reay* tendered his proof for the balance due, but the commissioners rejected his proof, because the bond for 3,000*l.* was not given up. This was a petition to prove, and stay the certificate.

Mr. *Montagu* and Mr. *Bethell* for the petition.

Mr. *Swanston* and Mr. *Bacon*, *contra*.

THE CHIEF JUDGE:—Where a party has a security for his debt from the bankrupt, he must either give up his security, or deduct its value from the amount of proof. If the value may be deducted, he may prove for the balance, and retain the security. In this case the petitioner may prove, and retain the bond. If the creditor improperly retain the bond, this decision will not prevent the assignees bringing an action for its recovery.

Sir *John Cross*:—If a debtor pay part of the debt, in order to induce the creditor to accept a composition for the remainder, and then break his engagement, the party may keep what he has got. I concur with the Chief Judge. (a)

Sir *George Rose*:—A creditor having property of the bankrupt's in his possession is not a ground for refusing

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(a) See *ex parte Vere*, 1 *Rose*, 281; 19 *Ves.* 93; *ex parte Richardson*, 14 *Ves.* 184.



the proof, though it may be a ground for restraining the payment of dividends. (a) Suppose in this case the party held a bill of exchange instead of the bond, the case would be clear, and why? When a bill is given, the substance of the transaction is, that the bill represents and passes the money by an equitable assignment; so does an equitable assignment of a bond. If the party had recovered the money on the bond, he might retain it; he may therefore retain the bond, which merely represents the money. If we did not think the party had a clear right to retain the bond, we might protect the dividend by a memorandum on the proceedings; but we think it clear that the party has a right to retain the bond.

1834.  
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*Ex parte*  
REAY.  
In the matter  
of  
CHAMPION.

Ordered as prayed. Costs of both sides out of the estate.

*Ex parte* HUTCHINSON.—In the matter of  
FREME.

C. of R.  
Nov. 12,  
1834.

THIS was a petition by a creditor for re-taxation of a solicitor's bill of costs.

After a solicitor's bill has been long paid, it cannot be taxed without special reasons.

Mr. Bacon, for the petition.

Mr. Swanston, *contrâ*.

*Per Curiam* :—This bill was paid six years ago, and no reasons for taxation have been lately discovered.

Petition dismissed.

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(a) *Ex parte Ackroyd*, 1 Gl. & J. 391; *ex parte Dobson*, 1 Mont. & Ayr. 666.



C. of R.  
Nov. 14,  
1834.

Assignees did not prove a debt, owing to their bankrupt, under another commission. The bankrupt is a creditor, who may petition to supersede the other commission if his assignees do not interfere.

An affidavit sworn before the petition is filed cannot be read, but the petition will stand over to have it re-sworn.

*Ex parte* TAYLOR. — In the matter of PERCIVAL.

THIS was a petition to supersede a fiat, for concert to procure the bankrupt his certificate, and for want of an act of bankruptcy. The facts are stated in the judgment.

Mr. *Wilcock*, for the petition.

Mr. *Swanston*, *contra*, objected, 1st, That the petitioner was not a creditor, as he had been bankrupt, and the debt therefore vested in his assignees. 2d, The affidavit in support of the petition was sworn the day before the petition was filed.

*Per Curiam* : — The first objection is not valid, if the assignees of the petitioner did not think it fit to prove the debt; he may be petitioning creditor, or prove. It might be different if that had been a second commission, and 15s. in the pound not paid under the first. The second objection may be got over by the petition standing over to have the affidavit re-sworn.

THE CHIEF JUDGE : —

This fiat was, from the beginning to the end, fraudulently concerted between the bankrupt and the petitioning creditor, who is his father. The 42d section of 1 & 2 W. 4. c. 56. (a) does not apply to a case like this,

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(a) That from and after the passing of this act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, save and except where any petition to supersede a commission for any such cause shall have been already presented, and shall be now pending.—1 & 2 W. 4. c. 56. s. 42.



where a fiat is fraudulently concerted for the purpose of giving the bankrupt the protection of a certificate, and defending the creditors. The alleged act of bankruptcy was a denial to one particular person, who was not a creditor, which is evidence that the bankrupt did not intend *bonâ fide* to deny himself.

.1834.

*Ex parte*  
TAYLOR.

In the matter  
of  
PERCIVAL.

The state of the proceedings proves this to be fraudulently concerted. No debt has been proved but the petitioning creditor's. The balance-sheets state he has no debtors, no creditors, no losses; his only property a salary from the petitioning creditor, his father; and his expenses balance his income to within 8*d*. It is clear the intent of this fiat could not be to distribute assets, but to clear the bankrupt.

Sir *John Cross* concurred in the order.

Sir *George Rose* : —

Even if the preliminary objection had been good, that the petitioner was not a creditor, yet the case once being before the Court, and being an instance of a fraud on the practice of the Court, we would not have parted with the case on that preliminary objection. (a)

In cases of fraudulent fiats the Court will not dismiss a petition to supersede, on a preliminary objection that the petitioner is not a creditor. But see post, *ex parte Jarman*.

The commission or fiat is in the nature of a writ of execution issuing from the Court. The writ of supersedeas depends on the general right of a Court to quash an execution so set up against creditors. If there be fraud in any execution in any Court, it may be set aside: the Court must defend the purity of its process: no concerted fiat will be allowed to stand; any fraud will cause a supersedeas.

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(a) This was constantly the doctrine of Lord *Eldon*. In *ex parte Hudson*, 2 *Russel*, 457, this was incidentally mentioned in argument, and an inquiry was directed as to the debt.



1834. *Per Curiam*:—The supersedeas must issue, with costs.

*Ex parte*  
TAYLOR.  
In the matter  
of  
PERCIVAL.

Mr. Swanston:—Costs are not prayed, therefore cannot be granted. (a)

In cases of fraud costs may be granted, though not prayed.

*Per Curiam*:—It is a general rule, that costs cannot be granted unless prayed. Fraud furnishes an exception to all rules: this being a case of fraud, costs will be given, though not prayed, as was settled in *ex parte Webster*. (b) Costs are not pressed against the solicitor; if they were, perhaps the Court might be induced to grant them, though not prayed.

C. of R.  
Nov. 14,  
1834.

*Ex parte* ANGLE. — In the matter of SMITH.

On a petition by an assignee for his removal, admitting misconduct, he cannot be ordered to pay costs incurred by such misconduct without a cross petition.

THIS was a petition by an assignee for his own removal. The petition admitted misconduct. The respondents urged that the removed assignee ought to be ordered to pay all expenses caused by his misconduct; but no cross petition was filed.

Mr. Swanston for the petition.

Mr. J. Russell and Mr. Bethell, *contra*.

*Per Curiam*:—

As the respondents have not filed a cross petition, we cannot engraft any thing as to expenses on this

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(a) *Ex parte Atkinson, Buck*, general rule was, that, if not 215; *ex parte Daintry, Mont.* 7. prayed, costs could not be given;

(b) *Ex parte Webster, re Gregory*, before the Vice-Chancellor, but that the Court sometimes would depart from that rule, 3d Aug. 1826, who said, “The where there was misconduct.”



order. The order for his removal will not be a bar to proceedings against him in this or any other court. A petition may still be presented against him for payment of the expenses in question; for his removal from being assignee does not remove him from the jurisdiction of this Court for acts done while assignee.

The order made was,—Let the petitioner be discharged from being assignee, paying the costs of this petition, of his removal, and of the new choice. This order to be without prejudice to any proceedings hereafter to be taken against the petitioner for any thing done under the bankruptcy. This order not to be set up in answer to any matter or thing relating to the bankruptcy.

1834.

*Ex parte*  
ANGLE.  
In the matter  
of  
SMITH.

*Ex parte* CARLOW.—In the matter of BIRKS.

C. of R.  
Nov. 14,  
1834.

THE bankrupt, being in possession of a quantity of candles, deposited them with the petitioner as security for a loan of money. The bankrupt, having a contract with the Board of Ordnance for candles, applied to the petitioner to allow the candles deposited to be sent there. To this the petitioner agreed, if the invoices were made out in his name, so that he should be entitled to demand payment. As the petitioner did not know how to make out the invoices, he requested the bankrupt to do so for him, which was done, and they were sent to the petitioner, who saw they were made out in his name. The petitioner not having any cart and horses, it was agreed that those of the bankrupt should be used. When the bankrupt delivered the candles, he fraudulently substituted other invoices made out in his own name. The Board had not paid the money at the time of the bankruptcy, but it had since been received by the assignees. This was a petition that the assignees

Where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership.



1834. might be ordered to pay over the money to the petitioner.

*Ex parte*  
CARLOW.  
In the matter  
of  
BIRKS.

The Court first required the petitioner to submit to be bound by the order of the Court, if against him, which was done.

Mr. *Chandless* for the petition.

Mr. *Swanston*, *contra*, contended that the candles were in the reputed ownership of the bankrupts.

The assignees  
can never  
ground a title  
on the fraud of  
the bankrupt.

*Per Curiam* : — There is no evidence of notice one way or the other ; but without that, this is not a case in which the bankrupt had the order and disposition, with “ consent of the true owner.” His only authority was to sell them in the name of the petitioner. The assignees can never ground a title through the fraud of the bankrupt.

Ordered as prayed. Costs of the assignees out of estate.

C. of R.  
Nov. 17,  
1834.

*Ex parte* THOMPSON. — In the matter of  
THOMPSON.

In general the  
Court will not  
grant a *vivâ*  
*voce* examina-  
tion after hear-  
ing a petition  
on affidavits ;  
but this rule is  
not inflexible.  
The party is not  
estopped by not  
applying before  
the hearing.

MR. *MONTAGU* moved that there might be a *vivâ voce* examination ordered in this case, as the petition would be heard this day. The application was made now in pursuance of *ex parte Baldwin*, 1 *Mont. & Ayr.* 617, where it was laid down, that if application were not made before hearing, the party was estopped.

*Per Curiam* : — The Court did not in that case lay down a general rule that the party was positively estopped from having a *vivâ voce* examination after having read the affidavits. The rule the Court lay



down is this, — In general the Court will not grant a *viva voce* examination after hearing a case on affidavits. But that rule is not inflexible; it must bend to circumstances.

*Ex parte* THOMPSON. — In the matter of THOMPSON.

C. of R.  
Nov. 17,  
1834.

THIS was a petition to supersede for want of an act of bankruptcy.

Mr. *Montagu* and Mr. *Keen* for the petition.

Mr. *Twiss* and Mr. *Wright*, *contrà*.

*Per Curiam*: — In this case the bankrupt was fully aware that he had committed an act of bankruptcy. That being the case, his petition must be dismissed with costs.

Where the bankrupt knows he has committed an act of bankruptcy, his petition to supersede will be dismissed with costs.

*Ex parte* JONES. — In the matter of JONES.

C. of R.  
Nov. 21,  
1834.

THE bankrupt had been committed by the commissioners for not answering satisfactorily. This was a petition for his discharge. (a)

Mr. *C. Jones* for the bankrupt: —

In this case the bankrupt, being examined as to how he had expended certain sums of money, stated he was unable to account for them otherwise than that he gave them to his housekeeper for household expenses; and that, if she were examined touching the items of expen-

An application for the discharge of a person committed by the commissioner for not answering satisfactorily may be by petition. Sir J. Cross, dissent.

That the warrant of commitment is not in Court, is not a preliminary objection.

Quære, as to the power of the Court of Review to issue a writ of habeas corpus?

(a) In *ex parte Jones*, 1 *Mont. & Ayr.* 704, it was decided that the application must be by petition, not motion.



1834.

—  
*Ex parte*  
 JONES.  
 In the matter  
 of  
 JONES.

diture, she would furnish such statements as would render his examination satisfactory on those points. The commissioners, however, did not examine her as to these points, but committed the bankrupt for not answering to their satisfaction.

There are also objections to the form of the warrant.

Mr. *Swanston* and Mr. *Temple*, for the assignees, objected, that the petition could not be heard, because, 1st, the warrant was not in Court; 2d, the application should be by habeas corpus, not by petition.

1st, Although in former times the Lord Chancellor occasionally acted on petition, yet the constant practice of Lord *Eldon* was to refuse to act otherwise than on habeas corpus. In *Crowley's* case, 2 *Swanst.* 1, where all the authorities were collected, Lord *Eldon* found very few discharges on petition, and those of ancient date. His words are (page 30), "This Court has, in several instances on petition, ordered the discharge of persons committed by the commissioners, sometimes ordering the commissioners to discharge him, sometimes the gaoler, passing over the commissioners. The instances, however, are not numerous. One of the earliest is *ex parte James*, in 1719, 1 *P. W.* 610. In *ex parte Lingard*, 1 *Atk.* 240, on the petition of a bankrupt committed by one of the common law judges on the certificate of the commissioners of his refusal to attend their summons, Lord *Hardwicke* said, "It is an entire new question, and quite a new case, and therefore at the first opening of it I had a great doubt whether I could properly determine the legality of the commitment, as a *habeas corpus* might have been sued out, and have been decided by the judges of the common law, which is the ready way; but I do remember a case of *John Warde*, before Lord Chancellor *King*, not unlike the present,



where he determined a commitment by the commissioners of bankrupt justifiable, after he had taken some time to consider of it. A like practice occurred in *ex parte Brailsford*, 13th October 1725, and in the bankruptcy of *Thomas Mace* in September and December 1728." Mr. *Cullen* said, "It was understood that your Lordship, in *Taylor's* case, had decided that a bankrupt under commitment for not answering could not be discharged on petition, but must obtain a writ of *habeas corpus*. That rule is consistent with Lord *Loughborough's* decision in *ex parte Nowlan*. The question, however, is not material to the present case, the bankrupt being brought before the Court by writ of *habeas corpus*."

1834.

*Ex parte*  
JONES.

In the matter  
of  
JONES.

THE CHIEF JUDGE:—

If this were an application on *habeas corpus*, coming under the 39th section of 6 Geo. 4, c. 16, this Court could not hear the petition, without consent, in the absence of the warrant, nor can the Court now proceed to entertain any questions as to the form of the warrant unless it be produced. In this case the bankrupt petitions and complains of the course pursued by the commissioners in the examination which led to his commitment. The question raised by that petition may or may not be such as to require the production of the warrant: that we cannot know till the petition is read. The preliminary objection to the hearing the petition, therefore, cannot be sustained. If, as alleged, the question turn on whether the examination be satisfactory, the Court can consider that, having the proceedings before them, which are the originals from which the warrant is made out.

The objection, that an application for the discharge of a person committed by commissioners can only be enter-



1834.

—  
*Ex parte*  
 JONES.

In the matter  
 of  
 JONES.

tained on *habeas corpus* is not valid, there being several precedents where it has been done on petition. We should not order the gaoler to discharge the bankrupt, which would be done on *habeas corpus*, but should intimate to the commissioners the course they ought to pursue. (a)

(a) As to the effect of this recommendation, there may be found to exist some difference between former times and the present, at least so far as the London commissioners are concerned. On this subject Mr. *Christian* says, "From the result of my investigation, I divide the whole jurisdiction of the Chancellor in bankruptcy into what I shall call direct and mandatory, and indirect and recommendatory. The mandatory part is expressly given him by the statutes; the recommendatory part, which is now by far the greatest, results from his patronage or his appointment of the commissioners, and his power to displace them for ever, if they presume to act contrary to his recommendation or direction. This is not a sudden thought; long ago it suggested itself to my mind; it is confirmed by a thorough investigation of the subject, and it now remains for me to endeavour to convince the professional reader that it is well founded."—Vol. ii. page 218. And again, at page 221, he says, "His judgment could only operate as advice and counsel, but he is a counsellor to whom

the commissioners owe their existence, and it would neither contribute to their interest nor to their credit to incur his displeasure. His recommendation assumes an imperative appearance, for he can dismiss for ever those who presume to act in opposition to it; and he has certainly a power to supersede the commission, and to grant a renewed commission to those who would act agreeably to his decision from that stage of the proceedings." And he says, at page 223, "If, in that part of the Chancellor's jurisdiction which I call recommendatory, the commissioners were to refuse to obey the Chancellor's order or direction, upon the plea of conscience or any other ground, the Chancellor may, without much trouble, surmount the difficulty; he may renew the commission at the expense of half of the fees of the original commission, and the new commissioners may adopt his order or judgment, and would have authority to act from that stage of the proceedings as if they had originally been named. See 5 G.2. c. 30. s. 45. He, who was their original creator, may, at any time



In cases like the present a petition has a great advantage over a writ: on *habeas corpus* the Court could only look at the warrant. In this case the warrant may be unimpeachable, as the circumstance of the refusal to examine the housekeeper may not appear thereon (a), and without her evidence the bankrupt's answers may be clearly unsatisfactory. On petition, the Court can be informed of facts not apparent on the warrant. If the Court found that the commissioners did not examine a witness who could have rendered the bankrupt's examinations satisfactory, it could intimate to the commissioners that they should examine that witness. (b)

1834.

—  
*Ex parte*  
JONES.  
In the matter  
of  
JONES.

Sir John Cross :—

The present question is the greatest and most important ever before the Court. It is, Whether the Court shall assent to the prayer of the petition to discharge the

when they provoke his displeasure, become their annihilator. By that section, and by that mode of proceeding, it may be truly said, the whole administration of a bankrupt's effects is vested in the Great Seal. It was vested originally in the commissioners solely, subject to the control of all the supreme courts in compelling them to act conformable to the statutes; but by the Chancellor's power of appointing and removing the commissioners at his pleasure, the whole administration of the estates of bankrupts becomes effectually vested in him. It is therefore immaterial whether his judgment is called a recommendation or an order."

Such was the state of the law

before the appointment of the present Courts of Bankruptcy. But *quære* the effect at this time of such intimation, as regards London commissioners. In *ex parte Nokes*, 1 Mont. & Ayr. 462, the Lord Chancellor intimated that it was a proper case for counsel to be heard on behalf of a person against whom a fiat had issued. The commissioner said, "The Lord Chancellor intimates a wish; and when a judge merely recommends in case after case, where if he had power to order he would do so, it might lead to an inference that he has no power to make an order."

(a) See 39th sec. 6 Geo. 4, c. 16.

(b) See *re Goodwin*, Mont. 304,

and the cases there cited.



1834.

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*Ex parte*  
 JONES.

 In the matter  
 of  
 JONES.

bankrupt? The assignees object that the bankrupt cannot, in any event, be discharged till the warrant is before the Court. In the cases cited in which the Court acted on petition, it does not appear that the warrants were not produced. Suppose the Court hears the petition, what can be done? Can it order the commissioners to discharge the bankrupt? The Court cannot control *them* in this matter, which depends on whether the party has answered to *their* satisfaction; therefore the order must be on the gaoler, and that order can only be made under a writ of *habeas corpus*, when the gaoler would bring in the warrant. No other Court in Westminster Hall would entertain this question in the absence of the warrant. A gaoler is liable to a penalty of 500*l.* if he discharge a prisoner without a sufficient authority, and if he discharged the bankrupt otherwise than under a *habeas corpus*, he might be liable to that fine.

I am therefore of opinion this Court ought not to hear this petition.

Sir George Rose:—

The objections taken are not preliminary. After hearing the petition, it may appear that such objections exist to our acting in this case on petition as to render it necessary to decide that we will not proceed without *habeas corpus*.

If the warrant were produced, every thing might appear smooth on the face of it, and the Court might feel itself called on to re-commit, so far as the warrant was concerned; but if it be fact that the bankrupt is committed for answering unsatisfactorily, though he tendered to the commissioners the means of satisfaction, which they would not receive, may we not intimate to them that they should hear the evidence? That would be quite independent of the warrant.



In this case, if we entertain the matter on petition, the gaoler is excluded, which on *habeas corpus* he would not be; he must then be present, and the order be made on him. There can be no doubt that the Court of Chancery has, during many years past, refused to entertain these questions except on *habeas corpus*; and Lord *Eldon*'s reason was, that so doing gave him power over the gaoler, and that though the power was clear over the commissioners on petition, yet as doubts might arise as to the power over the gaoler and other detainers on petition, therefore Lord *Eldon* chose to proceed on *habeas corpus*. We are appointed to succeed to the jurisdiction over bankruptcy, and, if any thing be a matter in bankruptcy, this is one.

If, in so serious a matter as the liberty of the subject, I saw my way clearly to the power of this Court to issue a writ of *habeas corpus*, I might probably be induced to follow Lord *Eldon*'s rule, and only entertain these questions on *habeas corpus*, but on that subject I am not free from doubts.

When the Lord Chancellor issued that writ it was not sitting in bankruptcy, but as a common law Judge, as sitting in the common law side of the Court of Chancery. (a) The order, too, was drawn up by the registrar in chancery, not by the secretary of bankrupts. Could the Master of the Rolls or the Vice-Chancellor issue a *habeas corpus*? It certainly never was done by either of those Judges. (b) How then has this Court power to issue the writ? Not under section 2. of 1 & 2 W. 4, c. 56, which transfers all matters in bankruptcy to this Court, nor under section 4, which enables the Court to issue process to enforce obedience to its decrees—decrees in bankruptcy.

1834.

—  
*Ex parte*  
JONES.  
In the matter  
of  
JONES.

(a) See to this effect *Crowley's* case, 2 *Swanst.* 1.

(b) See *ex parte M'Gee*, 6 *Mad.* 206.



1834.

—  
*Ex parte*  
 JONES.  
 In the matter  
 of  
 JONES.

If the Court find it necessary, it must not be supposed that it has not jurisdiction to enforce the discharge of the bankrupt by the commissioners. (a)

Objections overruled.

Mr. C. Jones then read the petition, and argued that the bankrupt ought to be discharged.

*Per Curiam*: — The bankrupt was not committed because he failed to give a satisfactory account of the sums said to be paid to his housekeeper, and which it is alleged she could have accounted for, if examined, but because his whole examination is unsatisfactory. This is the most unsatisfactory and shuffling examination ever laid before the Court. This petition must be dismissed with costs.



C. of R.  
 Nov. 22,  
 1834.

On an agreement for dissolution of partnership between two solicitors, the remaining partner agreed to pay the partnership debts. The assignees, knowing this agreement, continued to employ the remaining partner.

Held, the Court would not, on the application of the assignees, interfere to charge the outgoing partner. A petition for this purpose must be served on the continuing partner.

*Ex parte* GOULD.—In the matter of ROBINSON.

MESSRS. *Knight* and *Fyson* were in partnership from August 1821 to May 1826, when it was dissolved, and notice inserted in the Gazette. By the agreement for dissolution *Knight* was to pay all outstanding debts. *Knight* and *Fyson* were solicitors to the commission. *Knight*, however, alone attended to that business, and on the dissolution was continued as solicitor to the commission. Previous to the dissolution, the firm of *Knight* and *Fyson* recovered and received various sums from persons against whom actions had been brought under the commission. *Gould*, the assignee, frequently endea-

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(a) The Chief Judge said, his *pus.* Sir John Cross said, as the opinion was open on the question Lord Chancellor had the power, of the right to issue *habeas cor-* so had this Court.



voured to obtain the bill of costs of *Knight* and *Fyson* as solicitors to the commission, but did not succeed till 1833, when it was furnished by Mr. *Knight*. On taxation, and taking the account, it appeared that a large balance was due to the estate. The last item of receipt was in 1827. In 1830 *Knight* became bankrupt: the petition did not state whether he had obtained his certificate.

1834.  
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*Ex parte*  
GOULD.  
In the matter  
of  
ROBINSON.

This was a petition by *Gould*, the sole creditor's assignee, and *Whitmore*, the official assignee, praying that *Fyson* might be ordered to pay a certain ascertained sum, and that it might be referred to the Commissioners to take an account of all sums received by *Knight* and *Fyson*; and that *Fyson* might be ordered to pay the same.

*Per Curiam*: — This petition is not served on *Knight*. That is necessary. If he sets up his bankruptcy, his assignees must be served.

Mr. *Bethell*, for *Fyson*, was instructed to waive the objection.

Mr. *J. Russell* for the petition.

Mr. *Bethell* and Mr. *Follett* for *Fyson*: — The assignee, with a full knowledge of the dissolution, having continued *Knight* as solicitor to the commission, has elected to consider *Knight* alone responsible; consequently, though the legal right may be clear against *Fyson*, yet, there being no equitable right, the Court will not interfere on this, an application to its summary jurisdiction. In a late case in the King's Bench, which over-ruled, to a certain extent, some anterior cases, it was held, that where a partner had retired, third persons, aware of his retirement, could not sue him for partner-



1834.

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*Ex parte*  
GOULD.

In the matter  
of  
ROBINSON.

ship debts after they had allowed some time to elapse. The remedy on summary jurisdiction will not be larger than at law, only more prompt. In this case the petitioners could not recover at law, because the sums demanded were paid to *Knight* and *Fyson* more than six years ago; consequently the statute of limitations is a bar.—*Short v. Macarthy*, 3 *Barn. & Ald.* 626; *Granger v. George*, 7 *Dow & Ry.* 729; *Batty v. Falconer*, 3 *Barn. & Ald.* 288. The great object of the interposition of the Court in these cases is the protection of the estate; that will be provided for here; for, if neither *Knight* or *Fyson* pay, then the assignee must, he having improperly left the money in the hands of *Knight*, and the assignee is perfectly solvent.

Mr. *J. Russell* in reply:—Nothing can discharge a solicitor from his liability to account for monies received. Whoever has assets of a bankrupt's estate, knowing them to be such, is a trustee. It is not proved that the assignee so dealt with *Knight* as to discharge *Fyson*; it is not proved that the assignees knew that *Knight* was to pay outstanding debts; and though *Knight* conducted the business, one partner always conducts particular branches. As to the statute of limitations, the bill of costs was not delivered till 1833, and on taxation thereof, and not till then, this demand arose. *Ex parte Greaves*, 1 *Crompt. & Jervis*, 374, shows that the Court will interfere where an action would not lay.

THE CHIEF JUDGE:—This is not an application by a creditor coming to protect the estate, and calling on the assignee and solicitor to account, but an application by an assignee against one who was joint solicitor in 1826 for an account, &c. of monies received by the firm before 1826. A lapse of time would be no answer



to such an application made by a creditor; if it were, the assignees and solicitor might collude to defraud the estate. The assignees and solicitor are trustees as to all assets they get into their hands, and the solicitor is bound to advise the assignee how to act as to such assets. The assignee here knew of the dissolution in 1826. If, therefore, he did not intend to consider *Knight*, whom he continued solicitor to the commission, the responsible person, he ought immediately to have called in whatever monies were due from *Knight* and *Fyson*. Under these circumstances the assignee would be personally liable to the estate; and as he is solvent, and the question is merely personal between him and *Fyson*, there is no ground made out for the interference of the Court in a case where the money would not be recoverable at law.

Sir *John Cross* and Sir *George Rose* concurred.

*Per Curiam* : — This petition must be dismissed, but, as *Fyson* is so far to blame that he ought to have seen that the account was settled, without costs.

Dismissed. No costs.

*Ex parte* NEWTON.—In the matter of GOREN.

A PERSON being entitled to a reversionary share of stock and other trust property, assigned the same by deed to the bankrupt. It did not appear whether or not any notice were given to the trustees. The bankrupt subsequently deposited the deed with the petitioner as security for certain advances. The petitioner did not give any notice of this deposit to the trustees. This was the common petition for a sale.

1834.

*Ex parte*  
GOULD.

In the matter  
of  
ROBINSON.

C. of R.  
Nov. 24,  
1834.

If a cestuique  
trust assign his  
interest, and the  
assignee do not  
give notice to  
the trustee, but  
assign over, the  
new assignee  
need not give  
notice.



1834.

*Ex parte*  
 NEWTON.  
 In the matter  
 of  
 GOREN.

The doctrine of  
 notice not to be  
 extended.

Mr. *Bacon*, for the assignees, objected, that the property was in the reputed ownership of the bankrupt, as no notice had been given by the petitioner to the trustees of the deposit. (a)

*Per Curiam* : — There is no evidence that the bankrupt gave notice to the trustees of the assignment to him. If so, his only title was the possession of the deed, which title he transferred to the petitioner by the deposit, therefore no question of reputed ownership arises. The cases have gone very far, and there is no inclination in this Court to carry them any further.

Ordered as prayed.

C. of R.  
 Nov. 25,  
 1834.

Where the majority of the assignees wish the proceedings to be in the hands of a particular solicitor, the order is of course for their delivery accordingly, unless gross misconduct be charged, and a cross petition for removal, or an injunction.

*Ex parte* HALFORD. — In the matter of TATE.

MR. *TWISS* : — This is a petition by two of the assignees that the third assignee and his private solicitor may be ordered to deliver up the proceedings to them.

Mr. *Swanston* and Mr. *Koe*, *contra* : — The proceedings were handed over to the third assignee, to enable him to institute certain inquiries beneficial to the estate, which are not concluded.

*Per Curiam* : — When, as here, the majority of the assignees wish the proceedings in the hands of a par-

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(a) See *Smith v. Smith*, 4 Tyrw. 55, S. C. 2 *Crompt. & Mee.* 231.



ticular solicitor, the order is quite of course. (a) It is not necessary to consider the reasons adduced against the order, because no state of circumstances can override the right of the majority of the assignees to the possession of the proceedings, except glaring misconduct, and a *cross petition* for their removal, or for an injunction to prevent their acting as assignees.

1834.

*Ex parte*  
HALFORD.  
In the matter  
of  
TATE.

Ordered with costs.

(a) *Ex parte Scruby*, 1 *Rose*, 207; *Anon.*, 1 *Rose*, 207; *ex parte Tomkinson*, 2 *Rose*, 66.

*Ex parte GRAZEBROOK re*  
MILLER.

Two assignees were chosen, who signed an order on the solicitor to the petitioning creditor to deliver the proceedings to a solicitor nominated by them. This order was not complied with, and subsequently one of the assignees did not concur in the removal of the proceedings. Upon it being communicated to the solicitor that a petition would be presented to enforce compliance, he handed the proceedings over to the dissentient assignees, who afterwards returned them to the same solicitor.

This was a petition by one

assignee praying that his co-assignee might concur in the appointment of a proper solicitor, or that a new choice of assignees might be had.

The solicitor was not made a party to this petition.

Upon the petition being opened, the Court said that the solicitor was not justified in disobeying the joint order, and had no right to deliver the proceedings to one assignee, as the joint order could only be discharged by a joint revocation; that the necessity of proceeding with the commission required that the proceedings should not be withheld by a solicitor; that, had the application been made to compel a compliance with the joint order, the order would have been of course, with costs.

C. of R.  
Nov. 8, 1833.

If the two assignees sign a joint order on the solicitor to deliver up the proceedings, the Court will enforce it, though one subsequently virtually countermand the order.



C. of R.  
Dec. 10,  
1834.

On the usual petition of an equitable mortgagee for a sale, and leave to bid, the costs come out of the estate though the assignees do not consent. *Secus*, on an independent petition, to bid alone.

*Ex parte* BERKELEY. — In the matter of DEACON.

**MR. AYRTON:** — This is the usual petition for sale of an equitable mortgage, &c. and leave to bid.

Mr. *Swanston*, for the assignees, consented as to the sale, &c., but was not instructed to consent to the costs coming out of the estate, as the petitioner asked to bid.

*Per Curiam* : — If a sale have been already ordered, and a party comes with an independent petition for leave to bid, he must pay the costs thereof, unless the assignees consent they should come out of the estate ; but in cases like the present, where there is no objection to the party bidding, costs are of course in the usual way, though the assignees do not consent.

C. of R.  
Dec. 10,  
1834.

If the solicitor to the fiat have dividends in his hands received from the assignees under a pretended authority from the creditor, the Court has jurisdiction to order him to pay them over to the creditor.

*Ex parte* STORY. — In the matter of JOHNSTON.

**THIS** was a petition for payment of a dividend. The solicitor to the assignees had received part of the dividend under what he stated to be an authority from the creditor : the creditor denied having given any authority. The petition prayed that the solicitor might pay what he had received, and the assignee might pay the remainder, or that the assignee might pay the whole. (a)

Mr. *Green* for the petition.

Mr. *Bacon* and Mr. *Kean* for the assignees.

Mr. *Swanston*, for the solicitor, urged that, as

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(a) See *ex parte Winnall*, 5 Dea. and Ch. 22.



tioner denied having authorized the solicitor to receive the money, he was in no way liable to the petitioner, but only the assignees; (a) and that, if he was the agent of the petitioner, the remedy was an action at law.

1834.

*Ex parte*  
STORY.  
In the matter  
of  
JOHNSTON.

CHIEF JUDGE:—The order to pay the dividends must be against both the assignees and the solicitor. The assignees do not deny that the dividend is due, and there was no authority to the solicitor to receive it. The solicitor is accountable to the assignees, not as agent, but as solicitor to the commission; the order must therefore include the assignees, who may recover over against the solicitor.

Sir John Cross concurred.

Sir George Rose: — If the petitioner avowed that the solicitor was his agent, there might be some difficulty as to the interference of this Court. Excluding that, a dividend has been declared, and is not paid to the creditor, on which the order asked is of course. The solicitor has assets of the estate in his hands fixed with a trust. As to that sum, the petitioner ought not to proceed against the assignee till he has proceeded, under this order, against the solicitor.

*Ex parte* SOPER. — In the matter of SALTER and PEARSON.

C. of R.  
Dec. 10,  
1834.

SALTER and Pearson were in partnership as merchants. Salter resided in Manchester, and Pearson in London. Pearson was also in partnership with different

A person, before *ex parte* Moulton was decided, made a double proof to which, according to that case, he was not entitled. After seven

(a) *Ex parte Winnall*, 3 Dea. and Ch. 22.  
years, the Court will not order the dividends to be refunded, but made a prospective order.



1834.

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*Ex parte*  
 SOPER.

In the matter  
 of  
 SALTER  
 and another.

persons in London as warehouse-keeper, and during the five years preceding the fiat was in partnership with *Price*.

*Salter* and Co. drew bills of exchange on *Pearson* which he accepted, and a commission issued against *Salter* and *Pearson*. *John* and *William Higginbotham*, partners, proved some of these bills against the estate of *Salter* and *Pearson*; one bill in 1824, and another in 1825. In 1826 *William Higginbotham*, as surviving partner, claimed to prove against the separate estate of *Pearson* the balance due on the bills, after deducting the dividends already paid by the joint estate, when he was examined as follows:

Did you yourself sell the goods to Mr. *Salter*?—I believe I sold half of the lot of 800*l*. How long have you known *Thomas Salter* and Co.?—Ever since the firm of *Salter, Thompson, and Co.* Did you ever inquire who the partners were, or were you ever informed of it by any person?—No. When the bills were offered you, did you ever make any inquiry respecting Mr. *Pearson*?—No. Did you suppose him to be interested with Mr. *Salter*?—I did not know any thing about it. Did you consider it probable that the drawee and drawer were the same concern?—No, I did not. Did you consider they were two distinct concerns?—I considered that Mr. *Pearson* was a kind of banker set to take up the bills, but I kept the bills until they were due, or nearly so. Then did you place any additional reliance upon Mr. *Pearson* as a distinct party to the bills?—No, I do not know that I did; I never had any opportunity of thinking different. Will you swear positively that you had no reason whatever to suppose, and that you had no suspicion, when the bills were paid to you, or at any time before they fell due, that Mr. *Pearson* was in any way interested in the firm of *Salter* and Co.?—Yes.



Have you received the 6s. 8d. in the pound under the joint commission?—Yes. Have you received any goods or security?—No.

The proof was resisted by the assignees, but the commissioner allowed the proof. The petitioner, who was a creditor of the joint estate, only became acquainted with the facts of the double proof in May 1834. This was a petition that the creditor might elect against which estate he would prove, that his proof might be expunged from the other estate, and the dividends received thereunder refunded.

Mr. *Swanston* for the petition:—The creditor must elect under which commission he will receive the dividends, and refund those received under the other. *Ex parte Moulton*, *Mont.* 321.

Mr. *Piggott* for the creditor:—The last dividend was paid in 1828. After so long a period the party cannot be called on to repay, especially as he received the money in *alieno jure*, and has paid it over. If a payment be made under an idea that the party had a right, and there be no fraud, it cannot be recovered; *Brisbane v. Daces*, 5 *Taunt.* By an order of 24th March 1725, no decree can be appealed against to the House of Lords after it has been enrolled five years. *Beame's Orders*, 334, 338. *Ex parte Roffey*, 19 *Ves.* 468.

*Per Curiam* : — The length of time which has elapsed protects the respondent from refunding.

The order made was, that the creditor should elect whether he would remain a creditor on the joint or separate estate, and that the proof on the other estate should be thereon expunged, and that any future dividend declared on the estate on which he should elect

1834.

—  
*Ex parte*  
SOPER.

In the matter  
of  
SALTER  
and another.



1834.

—  
*Ex parte*  
SOPER.

In the matter  
of  
SALTER  
and another.

to remain a creditor should be carried over to the other estate, until the dividend already paid in respect of the proof expunged might be recouped to that estate; and *Higginbotham* (the petitioner) was restrained from receiving any future dividend on the proof remaining on the proceedings until further order, for which he was at liberty to apply. The costs of all parties out of the estate from which the proof is expunged.

Jan. 28,  
1835.

Minutes of an  
order can only  
be varied where  
there is some  
mistake or mis-  
understanding  
on the part of  
the officer.

This day a motion was made to amend the minutes.

Mr. *Swanston* for the motion:—The order made declared that future dividends were not to be paid. On inquiry it appears that there will be no future dividends; therefore the order, in effect, would be a dismissal of the petition. It is therefore asked that the order may be varied, and the dividends paid ordered to be refunded.

*Per Curiam*:—The minutes are according to the order. The only mode of proceeding to vary the order would be by petition of rehearing. Minutes are only varied when there exists some mistake or misunderstanding on the part of the officer which prevents the order of the Court being carried into effect.

Motion dismissed with costs.

March 14.

Confirmed on  
rehearing.

A petition for rehearing was presented, which came on for hearing this day.

Mr. *Swanston* and Mr. *K. Parker* for the petition:—According to *ex parte Moulton*, *Mont.* 321, the creditor had no right to double proof; but the Court thought the justice of the case would be met by ordering future dividends only to be paid to the estate from which the proof was expunged. It now appears there will be no future dividends, therefore the order as it now stands



amounts to a dismissal of the petition. The fact of double proof was not known to the petitioner till 1824 ; therefore there has been no delay.

Mr. *Piggott*, *contrà*, was stopped by the Court.

*Per Curiam* :—The Court before thought that under the very peculiar circumstances of the case the dividends could not be ordered to be refunded, and the Court sees no reason to alter the former order.

Petition of rehearing dismissed with costs.

1834.

—  
*Ex parte*  
SOPER.  
In the matter  
of  
SALTER  
and another.

*Ex parte* RICHARDS.—In the matter of  
HAWLEY:

C. of R.  
Dec. 13,  
1834.

**T**HIS was a motion as to the costs of a special case on an appeal before the Lord Chancellor.

The appeal was dismissed with costs, but the master refused to allow the costs of preparing and settling the special case, &c.

Mr. *Ching* now moved that such costs might be ordered to be taxed as part of the costs of the appeal.

The Court intimated to a master in chancery that he might allow the costs of preparing a special case as part of the costs of an appeal given by the Lord Chancellor.

Mr. *Swanston* and Mr. *Bagshawe*, *contrà* :—The costs of and relating to an appeal can be disposed of by the Lord Chancellor only, and the costs of preparing a special case are costs of the appeal.

*Per Curiam* : — The costs of preparing, &c. a special case, we should have thought, came within the costs of the appeal. If the master thinks otherwise, the party is entitled to ask this Court to intimate to the officer such our opinion.

Intimation accordingly.



C. of R.  
Dec. 13,  
1834.

If the commissioners certify that a consolidation will be beneficial, the assignees need not be served.

*Ex parte* SMITH. — In the matter of SHAW.

MR. *E. CHITTY*: — This is a petition by creditors that joint and separate estates may be consolidated. The commissioners have certified that it would be for the benefit of the estate. The assignees have not been served.

*Per Curiam*: — As the commissioners certify, the assignees need not be served.

C. of R.  
Dec. 13,  
1834.

If the mortgagee be himself a trustee to whom notice must be given. The transaction itself is notice enough to prevent reputed ownership.

*Ex parte* SMART. — In the matter of HOLT.

MR. *SWANSTON*: — This is a petition for the usual order for a sale of an equitable mortgage of trust property.

Mr. *Montagu* for the assignees: — It has been decided that notice to one trustee is enough. (a) In this case there was no notice, but the party was himself one of the trustees.

*Per Curiam*: — Notice to one trustee is enough in these cases. Here one of the parties was one of the trustees, and had notice of his own act. That is sufficient to prevent reputed ownership.

Ordered.

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(a) *Smith v. Smith*, 4 Tyrw. 55. S. C. 2 Crompt. Mee. & Ros. 231.



*Ex parte* WILSON, on behalf of the Liverpool Bank.  
— In the matter of BUTTERWORTH.

C. of R.  
Jan. 13,  
1835.

IN July 1831 *Butterworth*, the bankrupt, mortgaged, by way of demise for 500 years, to *Royds*, certain plots of land, factories, mills, warehouses, erections, and buildings, together with the steam-engines, and also all and singular other the movable and fixed machinery and steam-pipes then in and about and belonging to the said mills and premises. In October 1831 the Liverpool Bank paid off *Royds*, and the mortgage deed, &c. was delivered to the Bank, and an agreement was entered into for an assignment of the mortgage, &c., which, however, never was done. A fiat issued against *Butterworth* in February 1834.

Trade fixtures attached by the landlord, who is mortgagor in possession, are not in his reputed ownership.

See *ex parte* Betcher, post.

This was the petition of the Liverpool Bank for the usual order of sale in the case of equitable mortgages. It stated that the fixtures comprised in the mortgage consisted of three steam-engines, with four steam-boilers, which communicated with each other, all firmly built into the engine-house and boiler-house with brick and iron work; a large iron pipe, communicating across a passage from one of the boilers with one of the steam-engines, firmly attached to the boiler and steam-engine, and forming part thereof; an iron reservoir, communicating by means of an iron pipe with the boilers for the purpose of supplying them with water, the whole firmly fastened together; iron main shafting or gearing, with wooden drums attached, by which the first motion is communicated to the spinning machinery, and which main shafting was firmly attached to the main beams by iron slings screwed and bolted to such beams; a continued series of cast-iron pipes communicating with the boilers for beating the mills, and attached to the main



1835.  
 ———  
*Ex parte*  
 WILSON.  
 In the matter  
 of  
 BUTTERWORTH.

beams by iron slings fastened with bolts and screws ; a series of gas-pipes and burners throughout the mills, the same being passed through the brick walls and main beams of the mills, and firmly attached thereto.

That the steam-boilers, steam-engines, reservoir, main shafting or gearing, with the wooden drums, and the iron steam-piping and gas-piping, were what, according to the custom of trade in Lancashire, were reputed and considered as fixtures belonging to and forming part of the freehold.

The petition prayed that the Liverpool Bank might be declared entitled to the above premises and fixtures, &c.

The respondents admitted the mortgagees' claim to the buildings, the steam-engines, and the steam-boilers, but disputed their right to the main shafting and mill-gearing, steam-pipes and gas-pipes.

One of the affidavits in opposition by Mr. *Fishwich*, surveyor, was as follows : —

“ That this deponent is well acquainted with the town head-mills in Rochdale aforesaid, lately belonging to *James Butterworth*, the above bankrupt, and did on the 17th day of September last examine the same, and the situation and mode of setting up the engines, main shafting and gearing, and like apparatus therein, and made thereupon the plans and drawings herein-after referred to. That the said mills consist of three mills each, worked by the power of a steam-engine, the motion generated by which is transmitted to the machinery by means and through the intervention of a horizontal and upright main shafts and secondary shafts, and directly by means of straps passed over pulleys or wooden drums fixed on such main or secondary shafts. That the revolving motion produced by the action of each steam-engine is first transmitted to the main shaft-



ing and gearing by means of two spur-wheels, one of which is fixed on the end of the fly-wheel shaft of the engine, which protrudes from the wall of the engine-house, and which is termed the driving-wheel, and drives the other wheel, which is fixed on the end of a horizontal main shaft which extends along and the whole length of the room of the mills next adjoining the engine-house, and forming the ground floor, and from such horizontal main shaft motion is transmitted to the upper storeys of the mill by means of an upright shaft and of bevil wheels fixed on such horizontal and upright shafts and gearing, or working to each other. That the combination of the said two first-mentioned spur-wheels is technically called the first motion, and the working together of those two wheels, by the teeth of one driving the teeth of the other, forms the sole connexion between the steam-engine and the main shafting and gearing. That the said horizontal and upright shafts were not fixed in or attached to the buildings, but were supported by pedestals and steps held together by bolts or nuts and screws, and supported at the ends of the shafts in wall-boxes or frames fitted to receive the same, and at intervals between the ends of the horizontal shafts by hangers suspended from and screwed or bolted to the cross beams of the buildings; and all the said horizontal and upright shafts, and their pedestal, steps, and hangers, might be removed and taken down without any injury whatever to the buildings, or to the walls or timbers thereof, by merely unscrewing the nuts and screws by which the same are held, and are constructed with that view in order to their being from time to time altered, cleaned, and repaired. That the steam-pipes by which the said mills were heated, and the gas-pipes by which the same were lighted, were all set up and supported in the usual man-

1835.

*Ex parte*  
WILSON.

In the matter  
of  
BUTTERWORTH.



1835.

—  
*Ex parte*  
 WILSON.

In the matter  
 of  
 BUTTERWORTH.

ner, and calculated for being taken down and removed at pleasure without injury to the buildings, or the walls or timbers thereof. That all the articles aforesaid, namely, main shafting and gearing, from the first motion or driving-wheel, steam-pipes, and gas-pipes, are usually considered as movable articles, and not as part of the buildings in which the same are used; the same are common articles of sale, and frequently sold from out of mills in which the same have been put up; and the same, when put up by a tenant, according to the universal custom in Rochdale and the neighbourhood, movable by such tenant at the end of the tenancy."

One of the affidavits in support by Mr. *Fairburn*, civil engineer, stated, "that with respect to the mode by which the main and secondary or cross shafting-mill, gearing, and steam and gas pipes of cotton mills are affixed to the building or freehold, the practice of engineers in the bolting and fixing up thereof may vary in minute particulars, according to the skill or fancy of such proprietor or his engineer, or the improvements which are continually being introduced in that branch of business; but, with respect to the general principle, the universal method in use is, to attach or affix the apparatus aforesaid to the beams, pillars, or walls (as the case may be) of the mill by means of screw-bolts secured by nuts, as may be shortly described, as follows:—Holes or sockets of the same bore as the bolt are bored in the wood or iron in which the bolt is to be inserted, that is, in both the fixture to be put up and the beam or pillar to which it is to be affixed. The bolt itself is fitted at one end with an iron head firmly cemented thereto, and at the other end is formed a screw, and to fit such screw-end of the bolt there is made an iron nut, with a screw-thread therein; the bolt is then passed up to the head through its holes above mentioned, and on



the screw end thereof, which projects through the other side, is fitted the nut, which, being firmly screwed up, forms a head to that end of the bolt similar to the forced head at the other end thereof.

Mr. *Hibbert*, iron-founder, deposed, that the engines and boilers shafting and gearing, and steam and gas-pipes are necessarily and invariably affixed to the building, but the carding and spinning machinery are either merely placed upon the floors, or on blocks on sleepers thereon, or else are only so far screwed or affixed to the floors or walls as to give them stability for working, but are not necessarily screwed or fixed.

Mr. *Ashton*, cotton-spinner, deposed, that the engines, boilers, shafting, gearing, and steam and gas pipes are universally considered as necessary fixtures to and as an integral part of a spinning-mill, and are what give to a mill, as such, its specific distinction and character; and that a mill might have the machinery, properly so called,—that is, the carding, spinning, or other machinery, entirely removed from and out of the same, without the mill being thereby in anywise damaged either in point of stability or repair, or deteriorated for the purpose of being let or used again as a spinning-mill: but that if the shafting, gearing, and steam and gas pipes were sold, to be removed from the mill, the mill would be thereby greatly dismantled, damaged, and deteriorated, and would, in a great measure, lose its distinctive character of a mill, and the owner thereof would have great difficulty in procuring a tenant for it to be used as a spinning-mill, but would, in order so to let it, be obliged to fit it up, at his own expense, with the last-mentioned fixtures, in addition to engines and boilers therein.

Very many affidavits, however, were filed on both sides, and they were contradictory.

1835.

—  
*Ex parte*  
WILSON.  
In the matter  
of  
BUTTERWORTH.



1835.

—  
*Ex parte*  
 WILSON.  
 In the matter  
 of  
 BUTTERWORTH.

Mr. *Koe* and Mr. *Booth*, for the petition, having stated the facts, and having cited *ex parte Lloyd*, 1 Mont. and *Ayr.* 494, were stopped by the Court.

Mr. *Swanston* and Mr. *Anderdon* for the assignees:—  
 The petitioner does not show how the machinery was connected with the buildings. The mortgagee's right to the steam-engine is not disputed: the steam-engine causes a shaft to revolve, which projects out of the engine-house; that the mortgagee may also have: but there his rights end; there the duties of the engineer end, and those of the millwright commence. The evidence of Mr. *Ashton* shows this. He deposes, "that the steam-engine terminates with the fly-wheel shaft, beyond which nothing is furnished by the engineer who contracts to make the engine; unless, as is frequently the case, he engages, by express stipulation, to furnish the driving-wheel: and the shafting (a) and gearing throughout the mill are furnished by the millwright, and are wholly distinct from the engine, with which they have no connection, other than receiving motion therefrom, by means of the first motion wheel."

The 135th section of 6 Geo. 4, c. 16, enacts, that the statute is to be construed beneficially for creditors; that is for the general body of creditors, not any particular mortgagee. With this before us, we come to

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(a) Mr. *Ashton*, a cotton-spinner, deposed, that the term "main-shafting" means the main and secondary shafts, both upright and horizontal, and the wheels thereof, which are connected throughout the mill by iron wheels, or couplings without the aid of straps or belts, and which commence from the driving wheel of the fly-shaft of the steam-engine, and are continued throughout the various floors of the mill, and as distinguished from any counter-shafts which may be put up in sundry parts of any of the rooms, and which counter-shafts are separate from the afore-said general shafting, and are turned by straps or belts from the latter.



the 72d section. Now the question is, whether this machinery were goods and chattels? and it is clear they were. *Trappes v. Harter*, 3 *Tyr.* 603, *S. C.* 2 *Cromp.* and *Mee.* 153, shows this; not indeed the decision itself, which went on the intent of the parties, but the dictum of the Court. Lord *Lyndhurst* says (*Tyr.* 625.), “ It also appears that machinery of this description is in that part of the country bought and sold, without reference to the freehold. As, between landlord and tenant, therefore, it is clear that such machinery put up by the tenant might be removed by him. The bankrupts were the reputed owners of the machinery, and, in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that, with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor, and not to the heir.” And, after citing the authorities, his Lordship says (628.), “ Now these authorities lead to the conclusion; that, where utensils and machinery are put up by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and where this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate.” [Sir *G. Rose* :—Where property is originally chattel, it so remains, though fixed, if it can be removed without such serious injury to the freehold as would have the character of waste. In case of an execution, the sheriff may remove all such fixtures, as, having once been chattel and affixed, may be removed again without waste.] In *Lingard v. Messeter*, 1 *Barn.* and *Cres.* 308, a usage to let was insisted upon, but, nevertheless, the machinery was held to have been in the reputed ownership. In the present case the bankrupt was originally the owner, and there-

1834.

—  
*Ex parte*  
WILSON.

In the matter  
of  
BUTTERWORTH.



1834.

---

*Ex parte*  
WILSON.In the matter  
of  
BUTTERWORTH.

fore clearer acts are necessary to rebut the reputed ownership: there was no notorious transfer here. *Rufford v. Bishop*, 5 *Russ.* 346, and *Hubbard v. Bagshaw*, 4 *Sim.* 326, must be over-ruled before the Court can grant the prayer of this petition. In *ex parte Austin*, 1 *Dea.* and *Ch.* 208, Sir G. Rose said, “ I have no hesitation in saying, that, where fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt.” The witnesses for the respondent deny the existence of the custom contended for by the petitioners. The cases where the mortgagee was allowed machinery go on their being actual fixtures, or trade fixtures: the machinery here were not fixtures in any sense, but mere goods and chattels, in no way affixed to the freehold, and never rated to the poor, not being the profits of freehold. *Lloyd v. Ogden*, 1 *Mont.* and *Ayr.* 494, is not in favour of the petitioner as there the property was fixture. *Trappes v. Harter*, 3 *Tyr.* 603, actually decided that the machinery in question in that case was not fixtures: the judges there held that certain properties did not pass, because not intended to be passed; now, if those properties had been fixed to the freehold, they must have passed as part of the freehold, by operation of law, under the general words used in the mortgage deed, whether intended or not, unless expressly excepted, which they were not.

It is therefore submitted, that these properties are chattels, liable to all the rules attaching on goods and chattels, and therefore in the reputed ownership of the bankrupt.

Mr. Koe, in reply, was stopped by the Court.

The CHIEF JUDGE :—

The Courts which decided *Clarke v. Crownshaw*,



3 *Barn.* and *Adol.* 804, *Coombs v. Beaumont*, 5 *Barn.* and *Adol.* 72, *Boydell v. Macmichael*, 1 *Cromp.*, *Mee and Ros.* 177, appear to have thought that whatever was attached to the freehold are not goods and chattels : here nothing, however, turns on that point : no doubt the property in question, passes to the petitioner, unless in the reputed ownership of the bankrupt. If the machinery in question had been attached by the bankrupt as tenant, it would be expedient to look into the cases before giving judgment. But it appears to me that the facts of this case differ materially from those cases, and shut the assignees out from contending that the tenant had any right to remove the machinery in question.

The general and early rule was, that whatever is attached to, is part of the freehold : exceptions were made, in favour of tenants, that whatever a tenant fixed during his term he might remove during his term, unless such removal would cause material damage to the freehold. But if the owner fixes any thing to the freehold, it becomes permanently fixed, and cannot be removed : so that, if a tenant fixes, and execution issues against him, the sheriff may remove such fixtures, but not if fixed by the owner. *Wynn v. Ingleby*, 5 *Barn.* and *Ald.* 625, *Lee v. Riden*, 7 *Taunt.* 191.

The only question in this case is, whether or not, on the evidence, the subject matters in dispute were affixed in such a manner as to have become part of the freehold. It appears to me that they were, so that they could not have been taken in execution. At the same time, I wish to read the affidavits to ascertain how the property was affixed : if affixed, I need not consider my judgment, which is, that the machinery, gas-pipes, and other things asked in the petition, passed to the petitioners.

Sir J. Cross :—

Independently of bankruptcy, the mortgagees had a

1835.

—  
*Ex parte*  
WILSON.  
in the matter  
of  
BUTTERWORTH.



1835.

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*Ex parte*  
WILSON.In the matter  
of  
BUTTERWORTH.

right to this property; but the assignees urge it to have been in the reputed ownership, as they could detach it without injury to the freehold. Urging a right to disaffix admits that it is affixed. As between grantor and grantee, or mortgagor and mortgagee, the property in question would pass in a deed conveying the freehold, though not mentioned: they were in possession of the bankrupt, as part of the freehold, not as chattels. The right of the parties does not depend on the workman who puts up the machinery, whether engineer or millwright. The piston and beam, and many other parts of a steam-engine, are quite as movable as some of the machinery here contended to be chattel because removable, yet the assignees give up the steam-engine at once. The steam-pipes and gas-pipes are in the same predicament, and, like water-pipes belonging to a house, always pass by a conveyance of the house. If this had been a dispute between a landlord and a tenant who had put up trade fixtures, no doubt the latter might have removed them. But the two cases are distinct. The petitioner is entitled to the prayer of his petition.

Sir G. Rose :—

If, as the assignees contend, the property in question was never fixed, there is an end of the question: in order to ascertain that, the Court will read the affidavits. The rule of law, concerning property like this, which is chattel till affixed, is, that where a custom exists separately to demise such property when so fixed, they are not considered fixtures. The evidence of the petitioner shows enough custom to displace the right of the assignees claiming under the reputed ownership. I see no reason to change my opinion in *ex parte Austin*, 1 *Dea.* and *Ch.* 208, viz., that the rule is, that, where the tenant is bankrupt, how far fixtures may be removed is qualified



by this—Does there exist a right in the party to re-convert it into chattel by severing it during his term? If, by the act of bankruptcy, the bankrupt or his assignees lose the right to sever, that would be one way of settling the question; but I acknowledge no such right on the part of the mortgagee, for the assignees may still sever. The other point is between assignees and the owner of the freehold. It is frequently difficult to define what are goods and chattels, especially in bankruptcy. When a tenant becomes bankrupt at a time when he might sever, his assignees may sever, and consider the property as goods and chattels: when the owner of the freehold annexes, then the assignees do not take the property by the assignment, but by the bargain and sale, and are estopped from saying the property is chattel. Therefore, unless the question of fact be against the petitioners, they are fully entitled to the prayer of the petition.

1835.

*Ex parte*  
WILSON.

In the matter  
of  
BUTTERWORTH.

The CHIEF JUDGE:—

Jan. 23.

We are satisfied, from the affidavits, that the pipes and machinery were so attached as to be part of the freehold at common law. If the bankrupt had been a tenant, and had fixed the property in question for trade purposes, I should even then have thought it not within section 72 of 6 Geo. 4, c. 16; though there might be fixtures which would be within that section. If the bankrupt had been tenant, and the property goods and chattels, yet the custom to let such property along with the premises would have prevented the reputed ownership from attaching. In this case, however, the bankrupt was the freeholder and owner of the machinery, and the moment he affixed them they became part of the freehold, and consequently not chattels in his reputed ownership. Therefore, the mortgagee is entitled to the usual order.



C. of R.  
Jan. 13,  
1835.

Though an affidavit, alleged to be impertinent, is not read, it will be included in the order for costs by the registrar, unless ordered to be excluded at the hearing.

*Ex parte* BARRINGTON.—In the matter of BARRINGTON.

WHEN the petition was opened on a former day it was objected to an affidavit that it was impertinent. The Court said, “Wait till the other side attempt to read it:” the affidavit, however, was not attempted to be read. This affidavit was included with others in the taxation, by Mr. *Gregg*, of the costs of the petition.

Mr. *Bethell* now moved that the costs of this affidavit might be disallowed. The order states, “on hearing the petition and affidavits read;” but this affidavit was never read.

Mr. *Swanston* :—All affidavits filed are considered as read, on the subject of costs. *Ex parte Lucas*, 1 Mont. & Ayr. 405.

All affidavits filed are considered as read on the subject of costs.

*Per Curiam* :—All affidavits filed are considered read, on the subject of costs. *Ex parte Lucas*, 1 Mont. & Ayr. 405. If this affidavit were impertinent, care should have been taken to exclude it in drawing up the minutes. As the order now stands, the deputy registrar is right in his construction of it; and, however erroneous it may be, this is not a motion to amend it.

Motion refused, with costs.

C. of R.  
Jan. 14,  
1835.

A mortgage, given on the eve of bankruptcy, for a very old debt, is so suspicious that the Court will not interfere.

*Ex parte* DEWDNEY.—In the matter of DAVY.

THIS was the usual petition of a mortgagee, by deed of an equity of redemption, for a sale, &c. Twenty-two years ago the bankrupt gave the petitioner a bond, on which no interest had ever been paid. In February 1834 the bankrupt gave a mortgage for the sum, and in June 1834 he became bankrupt.



Mr. *Keen* for the petition.

1835.

Mr. *Bethell, contra*: — After so many years have elapsed, and no interest paid, and the mortgage given so soon before the fiat, it is so like a voluntary mortgage, and the transaction is so suspicious that the Court will not interfere, which it only does in clear cases. The assignees ought to have further inquiry. The decision of this Court does not prevent the mortgagee proceeding elsewhere.

*Ex parte*  
DEWDNEY.  
In the matter  
of  
DAVY.

The Court being of that opinion, the petition was dismissed.

*Ex parte* MATTHEW. — In the matter of  
MATTHEW.

C. of R.  
Jan. 14,  
1835.

A PETITION to reverse the adjudication under 1 & 2 W. 4. c. 56. s. 17. was presented and filed, but not served. Mr. *Montagu* applied, on the 13th of January, that the petition might be advanced, and for copies of the depositions; both which the Court refused, as there was not in Court an office copy of the affidavit in support of the petition. And Sir *George Rose* asked, whether this petition was *bond fide* the bankrupt's petition, and whether the petitioner would make an affidavit of that fact; as, if not, he was inclined to think that copies of the depositions ought not to be given at this stage of proceedings.

A petitioner to annul a fiat will not be allowed copies of the depositions, before there is an office copy of the affidavit in support of the petition.

Mr. *Montagu* this day, having the required office copy, renewed his application that the petition might be advanced, and for copies of the depositions. He stated that such an affidavit as mentioned by Sir *G. Rose* could not be made, as the fact was, that this application was



1835.

—  
*Ex parte*  
 MATTHEW.  
 In the matter  
 of  
 MATTHEW.

really on behalf of a judgment creditor, though the bankrupt was the nominal petitioner, as was the case in *ex parte Lavender, ante*, page 699. But the object of the 17th section of 1 & 2 W. 4. c. 56. is to remedy the evil of *ex parte* adjudications of bankruptcy; and the Court has said, that such applications as the present are beneficial. *Ex parte Smith*, 3 *Dea. & Ch.* 101. In *ex parte Jackson* a separate application was made for copies of the depositions, which was ordered. (a) *Ex parte Jackson*, 2 *Dea. & Ch.* 601.

It is not of course on a petition to reverse the adjudication, to grant copies of the depositions before the hearing.

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 Without an affidavit that there is no collusion, copies will not be granted before the hearing.

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 A petition cannot be advanced before it is served.

THE CHIEF JUDGE:—In *ex parte Smith*, 3 *Dea. & Ch.* 101, the petition was coming on for hearing, and the respondent had filed no affidavits by which the petitioner might be apprized of the case made against him. It is not a matter of course, that the bankrupt petitioning to reverse the adjudication, under section 17 of 1 & 2 W. 4. c. 56, is to have copies of the depositions on a preliminary application before the hearing. The Court, indeed, never will decide on such a petition, without giving the bankrupt the fullest opportunity of disputing the adjudication, and to do that he must have copies of or inspect the depositions. But this being a short petition, simply denying the act of bankruptcy, and there being no affidavit that there is no collusion, this is not the stage in which he ought to see or have copies of the depositions. As to advancing the petition, that cannot be done, as it is not yet served. (b)

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(a) C. of R. 5 March 1833. the petition, and abide by the order of the Court, and not to bring any action to upset his fiat, let him have copies of the depositions.  
 Mr. *Montagu* moved that copies of the depositions might be furnished; the bankrupt having petitioned to reverse the adjudication.

(b) *Ex parte Harding*, 1 *Mont. & Ayr.* 115.

*Per Curiam*:—On the bankrupt undertaking to go on with



Sir John Cross :—I concur. It may be worthy of consideration, whether, under this section, the depositions are evidence against the bankrupt.

1835.

*Ex parte*  
MATTHEW.  
In the matter  
of  
MATTHEW.

Sir George Rose :—It is quite impossible to work this 17th section so as to do justice both to the bankrupt and his creditors.

Motion refused.

*Ex parte* SMITH of the Beulah Spa.—In the matter of SMITH.

C. of R.  
Jan. 15,  
1835.

**T**HIS was a petition to reverse the adjudication under the 17th section of 1 & 2 W. 4. c. 56, and stood in the paper for hearing on the 21st of January. (a) The bankrupt undertook to abide by the decision of the Court, and to prosecute this petition. He had filed the usual affidavit in support of the petition, but the respondent had filed none. This was an application that the petitioner might be allowed copies of the depositions.

On a petition to reverse the adjudication, copies of the depositions will not be granted till the hearing.

*Per Curiam* :—The better course will be, to wait till the hearing, when the Court will order what may then appear right.

*Ex parte* RICHARDS.—In the matter of TREVOR.

C. of R.  
Jan. 15,  
1835.

**T**HIS was a petition by the executors and devisees of the bankrupt, who had paid 20s. in the pound, and was certificated, praying for a reference to commissioners or a master of an account delivered by the assignees, and

A petition, after a lapse of time, by the executors of the bankrupt, to charge the assignees for the default of old assignees, does not lie.

(a) It was not, however, heard till the 24th.



1835.

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*Ex parte*  
RICHARDS.  
In the matter  
of  
TREVOR.

the taxation of solicitor's bills of costs already taxed and paid. The original assignees were dead, and new assignees had been appointed, who had, as matter of courtesy, furnished the account in question, of items received and paid by the old assignees. All the items in this account were at times previous to the appointment of the present assignees.

Mr. *Swanston* and Mr. *Dixon*, for the petition, urged that the petition did not seek to charge the respondents, but merely to have an account. In cases of trusts in equity the account is constantly had against the present trustees.

Mr. *Barber*, *contra*, objected that the Court had no jurisdiction.

THE CHIEF JUDGE:—

This petition asks for an account already delivered as matter of courtesy, and for taxation of solicitor's bills already taxed and paid. It is said, its object is not to force the assignees to pay any thing. But what is the prayer? For reference of an account; not for delivery of a mere sheet of paper, but that the charges in that account shall be referred; therefore, though the paper is already delivered, yet the reference would in fact be taking the account anew, and the assignees would be in the same situation as if they had delivered no account: we cannot therefore order a reference, otherwise than to take an account in the usual way. Let us assume all the facts stated in the petition to be true, that the former assignees had acted improperly in making payments and charges; if then the bankrupt were alive, he might call on the persons so acting for an account, and to pay him the balance, and, as incidental to that account, which the



statute gives (a), the taxation of the bills would follow, in order to ascertain whether the payments made on account thereof were proper; and the result would be, that though the assignees might not be able to compel the solicitor to refund, yet they, as trustees, might be liable to the bankrupt. If, then, the assignees who paid these sums were alive, the account and auxiliary taxation would be of course; but some are dead, and their executors not served, and if they had, we should have no jurisdiction over them, there is consequently no ground to support the real object of this petition, viz. an account.

But it is said, the present assignees are liable to be called on for an account, as the present trustees. So they are, but only for what has actually come into their hands; and no monies were handed to them by the deceased assignees. If, therefore, an account were ordered against the assignees, it could have no result. On the broad ground, therefore, that there is no just ground for asking an account against the present assignees, this petition must be dismissed.

*Sir John Cross* concurred.

*Sir George Rose* :—No petitions receive more indulgence than those where a bankrupt seeks an account against his assignees, who are, under the circumstances of this petition, trustees for him. The account now asked might have been had long ago, and if the petitioners suffer it is by their own laches. A less tenable petition never was presented. If the executors were before the Court what jurisdiction should we have over them?

Petition dismissed, with costs.

1835.

*Ex parte*  
RICHARDS.

In the matter  
of  
TREVOR.

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(a) 6 Geo. 4. c. 16. s. 101.



C. of R.  
Jan. 16,  
1835.

Costs are given,  
when justice re-  
quires it, on an  
appeal from the  
commissioners.

*Ex parte* BROOKES.—In the matter of MOORE.

A PROOF had been expunged by the commissioners, on the application of the assignees; that decision of the commissioners had been reversed by the Court, and this was a petition to restore the proof. The principal question was as to costs.

Mr. *Elderton*, for the petition, cited *ex parte Ray*, 3 *Dea. & Ch.* 175.

Mr. *L. Wigram*, for the assignees, urged that it lay with the petitioner to take this case out of the general rule, viz. that costs are not given against the decision of the commissioners. *Ex parte Millington*, 1 *Mont. & Ayr.* 114.

THE CHIEF JUDGE:—Costs are discretionary. (a) General rules are only guides, and have their exceptions. Besides, this is not altogether a case where the petitioner succeeds against the decision of the commissioners. The assignees applied to have the proof expunged, in which they succeeded for a time, but on appeal the expunging was reversed; the assignee may therefore be said to have failed. This is a case in which the assignee should pay costs.

Sir *J. Cross* and Sir *G. Rose* concurred in the order.

Proof ordered to be restored, with costs.

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(a) 1 & 2 W. 4. c. 56. s. 5.



*Ex parte* SIDEBOTTOM.—In the matter of  
BARRINGTON.

C. of R.  
Jan. 16,  
1835.

**W**HEN called on, Mr. *Bethell*, for the respondent, asked for further time to reply to affidavits in answer.

A petition not to stand over to answer affidavits when there is laches.

*Per Curiam* :—A fortnight has elapsed since the affidavits in support were filed, and no reason is given why those in reply have not been filed; therefore we will not postpone the hearing, unless the respondent will pay the money in question into court. In the King's Bench rules *nisi* are at eight days.

The petition proceeded, but subsequently stood over on other grounds.

*Ex parte* RAMSBOTTOM.—In the matter of  
PENFOLD.

C. of R.  
Jan. 16,  
1835.

**P**RIOR to 1810 *Parker* was in partnership with *Edward Penfold* and *John Springett*. In July 1814 the partnership was dissolved as to *Parker*, who then was a creditor of the firm for a considerable sum in respect of stock. By the articles of dissolution, *Edward Penfold* covenanted to indemnify *Parker* from all losses, &c. in respect of the partnership business. And it was agreed that certain securities mentioned in a schedule, and deposited with *Parker*, together with the monies payable in respect thereof, should be retained by him for two years as an indemnity against all the partnership subsisting debts, and until the debts from the firm to the petitioner should be discharged, and as a security for the discharge thereof; and the debt so due was to be dis-

An equitable mortgagee is entitled to compute interest up to the time of taking the account, as against his security.



1835.

—  
*Ex parte*  
RAMSBOTTOM.  
In the matter  
of  
PENFOLD.

charged by replacing the stock by instalments. Among these securities was a mortgage. On the 27th of March 1816 a commission issued against *Penfold, Springett*, and *Penfold*. On the 19th of June 1821 *Parker* presented the usual petition for sale of an equitable mortgage. An issue was ordered, by the Vice-Chancellor, as to the validity and amount, &c. of the debt due to *Parker*. On the 28th of March 1822 *Parker* appealed to the Lord Chancellor, who ordered an issue, whether the petitioner was entitled to prove any and what debt, and whether he had any legal lien on any and which of the securities. On the 27th of May 1823 a verdict was found in favour of *Parker*, subject to the opinion of the King's Bench on a special case, which was afterwards argued, when the Court held that *Parker* was entitled to prove, and that he had a legal lien on the several securities held by him, and that he was entitled to prove for the value of the stock owing at the day of the bankruptcy. In March 1825 *Parker* presented a petition, that this decision might be confirmed, and his securities sold, &c.; and the assignees presented a cross-petition. On the 16th of March 1826 the Lord Chancellor confirmed the decision of the King's Bench, and *Parker* was declared entitled to prove either against the separate estate of *E. Penfold* or *Springett*; and it was referred to the commissioners to take an account of the several sum and sums of money which had been received by the said *Robert Parker*, or by any person or persons by his order or for his use, in respect of the said several securities; and it was directed, in the taking of the said accounts, that the principal monies which should have been so received by the said *Robert Parker* should from time to time be applied in payment and reduction of the said principal sum of 9,150*l.*, the admitted value of the said 1,500*l.* bank annuities; and that the said *Robert Parker*



should be allowed to deduct, receive, and retain the rents and issues and annual profits which, from and since the date of the said commission of bankruptcy up to the date of this stating order, should have arisen, accrued due upon, from, or in respect of the said several securities, as and in or towards payment of the dividends of the 15,000*l.* stock, prior to the bankruptcy of the said *E. Penfold* and *John Springett*, and the interest subsequent to the date of the commission of bankrupt, or so much of the said sum of 9,150*l.*, the admitted value of the said 15,000*l.* bank annuities, as should from time to time have been remaining due, after application of any principal monies or surplus rents and issues and annual profits received by the said *Robert Parker* as therein aforesaid. But in case the amount of the rents, interest, and annual proceeds accrued subsequent to the date of the said commission, and which had been or should be received by the said *Robert Parker* as last aforesaid, should be more than sufficient for the payment of the interest, at and after the rate of 5*l.* per cent. per annum, accruing on so much of the said sum of 9,150*l.* as should be remaining due from time to time after application of such principal monies and surplus rents and issues and annual profits as aforesaid, then his Lordship directed that the surplus of such rents and issues and annual profits should be applied from time to time towards satisfaction and in reduction of what should from time to time be found to be remaining due of the said sum of 9,150*l.*, the amount of the said admitted value of the said 15,000*l.* bank annuities as aforesaid. And it was thereby ordered, that the hereditaments and premises comprised in the said several securities, still remaining in the hands of the said *Robert Parker*, be forthwith sold by auction under the direction of the said assignees.

1835.

—  
*Ex parte*  
RAMSBOTTOM.  
In the matter  
of  
PENFOLD.



.1835.

—  
*Ex parte*  
 RAMSBOTTOM.  
 In the matter  
 of  
 PENFOLD.

The property in question was sold in 1827. On proceeding to take the accounts, the petitioner contended that he was entitled to compute interest on the sum of 9,150*l.* to the time when the account should be settled, and to apply the rents and profits in satisfaction of interest up to the date of the accounts. The commissioner (*Merrivale*), on hearing the parties, made the following memorandum: “ I am of opinion, that under the order of the 16th of March 1826 interest on the debt due to Mr. *R. Parker* did not cease at the date of such order, but he is entitled to interest subsequent thereto.”

This was the petition of the assignees, praying that it might be declared that interest ceased on the 16th of March 1826.

Mr. *Swanston* and Mr. *Bethell* for the petition:—  
 The question depends on the construction to be put on Lord *Eldon*’s order. If the creditor had no mortgage he could not prove for interest. Does the mortgage entitle him so to do? The respondent admits he could not prove interest accruing due subsequently to the sale; but he claims to pay himself principal and interest out of the rents and profits, and to prove the balance only. The debt proveable is what was due at the date of the commission; and whatever a party obtains from his security he must apply in reduction of such debt; he must account for what he receives; but he cannot add the arrear of interest due since the commission. [Sir *G. Rose* : — He cannot prove for such interest; but can he not apply the rents thereto?] A mortgage is a security for the amount of debt due at the date of a commission or fiat. Whatever is derived from that security must be applied in reduction of that debt. To apply it to subsequently-accrued interest would be to



apply it to a subsequently-accrued debt. Suppose the security to produce no rents and profits, it is clear in that case he could not add subsequent interest to his debt. Does, then, the productive or non-productive nature of the security determine the question? If the rents are applied to interest, instead of the reduction of principal, the sum to be proved will be greater. Therefore the creditor in effect proves a sum composed of interest due after the commission; the debt proved is greater than it otherwise would be; and Lord *Eldon*, in *ex parte Badger*, 4 *Ves.* 165 (a), decided that no proof could be made for interest on a mortgage beyond the date of the commission.

1835.

*Ex parte*  
RAMSBOTTOM.  
In the matter  
of  
PENFOLD.

THE CHIEF JUDGE: — It is not necessary to consider the general rule in this case, Lord *Eldon*'s order being express. The mortgagee does not seek to prove for interest due since the commission, but to prove without accounting for rents and profits, and having them applied in reduction of the interest; and the question is, Can he do so? He could not add subsequent interest to his proof; but it is said he does so in effect. The order of Lord *Eldon* gives interest up to the date of that order, but is silent as to subsequent interest. Without that order the creditor might have an account taken before the commissioners, and the interest kept down. He might also sell the estate, apply the balance in reduction of his debt, and prove for the difference. The sale was in 1827; but, from difficulties which arose, the account was not taken till lately. From the date of an order of sale the mortgagee in possession is entitled to the rents and profits. If so, the assignees cannot call on a mortgagee to bring into account rents and profits received since an account was ordered to be taken, and

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(a) For the law previously to that case, see Appendix A.



1835.

*Ex parte*  
RAMSBOTTOM.  
In the matter  
of  
PENFOLD.

which they ought to have taken long ago. It would be unjust to deprive the mortgagee of both rents and interest, because the completion of Lord *Eldon's* order has been delayed. If the premises had been sold, he would have been enjoying the interest of his money.

Sir *John Cross* : — This case will not bear argument when once the facts are known. There is no ground for this petition.

Sir *George Rose* : — It is unquestionable that, so far as proof is concerned, interest stops at the date of a fiat ; but, where there is a security, interest is regulated by the contract. Lord *Eldon's* order is silent as to what are to be the rights of the parties after the sale, because it was not anticipated but that the sale would be instant, when the rents, &c. would belong to the vendee. It is generally understood that persons in any way indemnified are entitled to interest subsequent to the fiat. Here the respondent (independently of being mortgagee) advances money to his firm, and is to be indemnified under the deed ; he therefore on that ground is entitled to interest, as he otherwise would not be fully indemnified.

Petition dismissed with costs. (a)

C. of R.  
Jan. 19,  
1835.

If, on a *vivâ voce* examination, witnesses are ordered out of Court, the petitioner, being a witness, has a right to remain in Court.

*Ex parte* DUGARD. — In the matter of AUGHTIE.

THIS was a petition to expunge a debt. A *vivâ voce* examination had been ordered on a former day, which now came on.

Witnesses were ordered out of Court.

(a) See *Parker v. Ramsbottom*, 3 Barn. & Cres. 257.



Mr. *Swanston* and Mr. *Montagu* for the creditor objected that the petitioner, who was to be examined by them, had not left the Court.

1835.

—  
*Ex parte*  
DUGARD.  
In the matter  
of  
AUGHTIE.

Mr. *Twiss* and Mr. *Bacon* for the petitioner resisted this. Being petitioner, he had a right to remain. Suppose he chose to conduct his own case?

THE CHIEF JUDGE: — As the party is both petitioner and assignee, and the case does not solely or even principally turn on his evidence, and he is not to be examined in support of his petition, but by the counsel on the other side, he comes within the exception to the rule, in the same manner that a solicitor giving instructions does.

Sir *John Cross* concurred in this instance, without laying down any general rule. (a)

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(a) In *ex parte Eardley*, April 15, 1815, the Chancellor directed an inquiry before the commissioners, whether there were any joint estate of *Graves*, *Whateley*, and *Paton*. There was a surplus on the separate estate of *Paton*, and the assignees of *Graves* and *Whateley* were desirous to show that such joint estate existed, as a mode of applying the surplus on *Paton's* estate to the liquidation of a joint debt of *Paton*, *Graves*, and *Whateley*, instead of permitting the joint creditor to prove against the separate estate of each. During two examinations before the commissioners *Paton* was present. At the next meeting the counsel of *Graves* and Co. insisted that Mr. *Paton* should be excluded. The commissioners directed him to retire; he declined to quit the room; the assignees of *Graves* and Co. did not intend to call Mr. *Paton* as a witness, nor did the assignees of Mr. *Paton*. The joint creditor said that he should reserve to himself the right to examine Mr. *Paton* if to him it should appear expedient. Mr. *Paton* and his assignees presented a petition, praying that he might be present during the examination. Sir *S. Romilly* and Mr. *Montagu* for the petitioner contended that, by the law of England,



C. of R.  
Jan. 22,  
1835.

Although there be not evidence of the trading on the proceedings, the fiat will not be superseded, if the bankrupt admitted to the petitioning creditor that he was a trader.

*Ex parte* BAILEY. — In the matter of BAILEY.

**T**HIS was a petition to supersede for want of an act of bankruptcy. The party was a farmer, and the alleged trading selling sheep. The trading was not sufficient to support the fiat; but the respondent stated that the bankrupt had admitted to the petitioning creditor that he was a trader.

Mr. *Swanston* and Mr. *Montagu* for the petition.

Mr. *J. Russell* and Mr. *Coleridge* for the respondent.

*Per Curiam* : — The affidavits do not support the trading; but the party is stated to have admitted to the petitioning creditor that he was a trader, and thereby deceived him. If that be true the Court would not supersede; but the party denies the fact of such admission. The balance of testimony is therefore even, and the Court will not supersede without a *vivâ voce* examination of the parties.

Petition to stand over till after term, with liberty to either party to apply for a *vivâ voce* examination. (a)

every party to a suit was entitled of right to be present during the argument. The Chancellor stopped Mr. *Montagu*, and said, "Without entering into the general question, upon which however I have a strong opinion, it appears to me that no objection having been made to Mr. *Paton's* continuing during either of the two first meetings, it is too late

now to exclude him." Mr. *Hart* and Mr. *Agar* on the other side. The Lord Chancellor, without hearing any reply, ordered "that Mr. *Paton* should be permitted to attend, and, under the peculiar circumstances of this case, whether he is to be examined as a witness or not."

(a) This case was afterwards compromised.



*Ex parte* MYERS. — In the matter of SUDELL.

C. of R.  
Jan. 22,  
1835.

MR. KOE moved for the four-day order to produce books, or stand committed. The deputy registrar certifies the order to produce and non-production. The certificate was signed yesterday, and this application was on motion, not on petition.

The order of committal, after the four-day order, must be on petition.

*Per Curiam* : — This application is merely on a motion paper; it should be moved on petition presented. Every step towards commitment should be mentioned to the Court. The certificate is not dated of to-day; but on an application for commitment for non-production, &c. the certificate must be of the day on which the motion is made.

Every step towards commitment must be mentioned to the Court.

The application to commit must be made on the same day the certificate is made.

Mr. Koe renewed his motion on a certificate dated this day.

Jan. 23.

*Per Curiam* : — Take the order, but present a petition, and draw up the order on petition.

*Ex parte* LIDDIARD.—In the matter of COWARD.

C. of R.  
Jan. 23,  
1835.

HENRY COWARD, James Coward, and Richard Moore were partners. In August 1833 they dissolved partnership as to Moore, and by the terms of the agreement for dissolution the two Cowards were to pay the partnership debts, the property of the firm being assigned to them. Notice of this dissolution was inserted in the *London Gazette*. The petitioner was a creditor of the firm of Cowards and Moore, and in November 1833 drew a bill of exchange, at one month, on Cowards and

If a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable.



1835.

—  
*Ex parte*  
 LIDDIARD.  
 In the matter  
 of  
 COWARD.

*Moore*, and sent it for acceptance to the house on which the late and present firm carried on business. A letter was returned signed by the two *Cowards* only, requesting it might be at two months, which was acceded to, and it was accepted of “*Cowards and Moore*,” and returned in a letter with these words, “You may depend on our giving it protection. *H. & J. Coward*.”

Fiats subsequently issued against the two *Cowards*, and also against *Moore*. Proof was tendered on this bill under a joint fiat against the two *Cowards*, and also under a separate fiat issued against *James Coward*, and rejected. This was a petition to prove against both estates.

Mr. *Burge* and Mr. *Montagu* for the petition:—This bill was accepted in the name of three after one had retired; therefore, as to the third, was a nullity, and may be proved against the other two.—[Sir *G. Rose*:—The three were debtors; the petitioner draws on the three, and the three accept the bill. What evidence is there, then, that the petitioner acceded to the arrangement, and considered the two alone liable?]  
 —In *ex parte Freeman* (a)

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(a) This case is reported *contrà*, in *Buck*, 471; but the decision there was over-ruled on appeal in August 1820. It has been reported in *ex parte Fry*, 1 *Gl. & J.* 96, that *ex parte Freeman* was disposed of on appeal without argument. The fact was, and as Mr. *Montagu* stated publicly in court in reply to Mr. *Cullen*, which reply is omitted in the report, that when the petition of appeal was called on for hearing, Mr. *Girdlestone jun.*, who was counsel for the assignees, appeared and consented to the application, but that Mr. *Montagu* thought it his duty to his Honor the Vice-Chancellor that the point should be mentioned to the Lord Chancellor; and his Lordship was pleased therefore to say, that he would take the papers home and read them carefully; that he took them home accordingly, and on a future day he was pleased to say that he had read



it was decided that where by deed the stock and effects of a partnership are assigned to the continuing partner,

1835.

*Ex parte*  
LIDDIARD.  
In the matter  
of  
COWARD.

them carefully; that he had considered the question settled for many years, and that he, in his judgment in a similar case, *ex parte Peele*, 6 Ves. 603, had followed the decisions of his predecessors, and he therefore reversed the order made by the Vice-Chancellor. Mr. Montagu therefore thought it his duty to the profession to collect the various cases upon the subject, which he published, with such reasoning as occurred to him, in page 92 of his Annual Digest. To this note Mr. Montagu referred Mr. Jameson, one of the reporters, but no notice was taken of it by the reporter. The following is an abstract of the note:—

*The cases on the subject are, First, Where there is a contract implied from the acts of the party, without any express agreement between them.—Ex parte Jackson*, 1 Ves. 31. But see *Daniel v. Cross*, 3 Ves. 279. *Second, Where there is an express agreement between the parties.—Ex parte Clowes*, 2 Bro. 595. *Ex parte Apsley*, 3 Bro. 265. *Ex parte Bingham*, Cooke, 509. *Ex parte Peele*, 6 Ves. 603. *Ex parte Williams*, Buck, 14. *Ex parte Freeman*, Buck, 471.

*The first principle on which the law is founded appears the*

justice of requiring that the party who receives the property should be the party to pay. This, however, is not sufficient without some undertaking by the party who receives the property. In *ex parte Hunter*, 1 Atk. 225, Lord Hardwicke thought that the mere receipt by the firm was sufficient to enable the creditor to stand in the place of the partner to whom the advance was actually made. It is clear that the law in this case was mistaken; there must be something more than the mere receipt of the money to make the debt joint; there must be a contract, express or implied, by the firm, and the mere receipt of the money is not sufficient evidence of a contract. But when the justice of the case seems to be, that the firm which receives the money should pay the real proprietor, that *qui sentit commodum sentire debet et onus*, it will not perhaps be the cause of much astonishment that any slight circumstance, in addition to the receipt of the money, should be considered sufficient evidence of such implied contracts. See *ex parte Hunter*, 1 Atk. 224. In *ex parte Jackson*, 1 Ves. 132. Lord Thurlow, under the influence of this principle, says, "If I can come at it in any manner, I will. If they have in any way consi-



1835.

*Ex parte*  
LIDDIARD.  
In the matter  
of  
COWARD.

who covenants to pay the joint debts, the joint creditors who do not, previous to the bankruptcy, accept the continuing partner as sole debtor, have an election to prove against the separate estate of the continuing partner.

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dered the debt as a joint debt, I will understand it so as it ought to be." See *ex parte Peele*, 6 Ves. 602; and see *ex parte Freeman, Buck*, 472, where the Vice-Chancellor thought the right did not exist.

The second principle on which the law is founded appears to be the justice in requiring that the party who receives the property upon any condition, should perform the condition on which the transfer of the property was made.

1. When the property is assigned unconditionally, there is not any charge upon the property, or any alteration in the personal liability of the debtors.

2. When the property is assigned, upon condition that it shall be charged with the payments of the debts, the creditors are not defeated of their claims against the property to which they have trusted. The partner is, as he would be by legal operation, in possession as trustee for the payment of the joint debts. *Ex parte Williams*, 11 Ves. 7.

3. When the property is assigned without any charge upon it, but with a personal liability of the assignee, is it equitable that the assignees should take the pro-

perty unless he perform the condition, and that the creditors should be entitled to the equity between the partners, which, in converting the property, does not defeat the condition.

In *ex parte Ruffin*, 6 Ves. 128, The Chancellor says, "The assignment was not made subject to the payment of the debts, but in consideration of a covenant leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts."

The partnership might also be dissolved by the bankruptcy of one or both, and by effluxion of time. If dissolved by death, then by the law of merchants and the well-known doctrine of the Courts, the death being the act of God, the legal title in some respects, the equitable title in all, would remain, notwithstanding the survivorship, and the executor would have a right to insist that the property should be applied to the partnership debts.

3. The separate creditors are not in a worse situation, for upon payment by the outgoing partner of the joint debts, he is entitled to prove against the separate estate.



Many other cases establish this doctrine. (a) If there be any agreement between the partners, of which the creditor was ignorant till after the bankruptcy, he may take advantage thereof, and say, "I now am aware I have rights of which before I was ignorant." If an outgoing partner assign all the partnership property to a remaining partner, the creditors cannot follow that property, unless there were some agreement enabling them. Lord *Eldon* always repudiated *ex parte Freeman*, *Buck*. 471. The slightest evidence of assent on the part of the creditor before the bankruptcy is sufficient to give creditors a right to follow the assets.

1835.  
—  
*Ex parte*  
*LIDDARD*.  
In the matter  
of  
*COWARD*.

[*Sir G. Rose* :—I confess I am surprised to hear that Lord *Eldon* repudiated the doctrine of *ex parte Freeman*. A dissolution and assignment create a consideration for the promise, on the part of the continuing partner, to pay the joint creditors; but then the creditors must accede to the arrangement before the bankruptcy, and very little is evidence of that assent. Is there that little here? Probably the answer of the two requesting time might do, but for the fact that afterwards the bill was drawn on and accepted for the three.]

*Mr. Swanston* for the assignees :—If the petitioners had agreed to assent to the arrangement made between the partners, and to look to the two *Cowards* alone for payment of their debt, no doubt they would succeed on this petition, if they had declared such assent before the bankruptcy. *Ex parte Freeman*, *Buck*, 472.—[*Sir J. Cross* :—Is not the acceptance virtually that of the two? Had they any possible right to accept on behalf of themselves and *Moore*?]—The question is, Whether the two acceded to the arrangement before the bankruptcy? It is not

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(a) See 1 *Mont. & Gregg. Dig.* 253.



1835.

—  
*Ex parte*  
 LIDDIARD.  
 In the matter  
 of  
 COWARD.

pretended that they did ; in fact they could not, as they did not discover the fact till after the bankruptcy. That the two had no right to accept in the names of the three makes no difference, as the question does not turn on the acts of the firm, but on the acquiescence of the petitioners.

Mr. *Burge*, in reply, was stopped by the Court.

THE CHIEF JUDGE:—There are two ways in which the petitioner might prove against the joint estate. Originally the debt was owing by *Cowards* and *Moore* ; if it had remained so, and no security had been given by the two *Cowards*, the petitioners could only prove against the two ; their claim is either against the three, or on a security given by the two for the debt of the three. The mere agreement between the partners, without the acquiescence of the creditors, is not sufficient to render the two *Cowards* alone liable. The first way of considering this question is, Whether there were any such act on the part of the petitioners ? If the whole case depended on that, I should say there was not enough evidence, the letters acceding to the terms proposed being addressed to *Cowards* and *Moore*. But the second way of considering the question is, that the three being indebted, and the two *Cowards* being pressed for payment, the two agree to pay, whereon the petitioner draws on them, and then gives them further time. The two *Cowards* accept in the name of *Cowards* and *Moore* ; this makes the *Cowards* jointly liable at law ; they are therefore jointly liable in bankruptcy. The debt is owing by the three, but the security that of the two, as they had no right to use the name of *Moore*, and the consideration for the two adopting the debt of the three is the extension of time. The result is, that the two had a



good consideration for undertaking to pay the debt of the three, and did so undertake before the bankruptcy; the debt is therefore proveable against the two.

1835.

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*Ex parte*  
LIDDIARD.  
In the matter  
of  
COWARD.

Sir *J. Cross* :—No doubt the petitioner could recover against the two *Cowards* at law, for they having no authority to use the name of *Moore* it is the same as if they had not used it; the petitioners can therefore prove against them, there being no equity to restrain such proof.

Sir *G. Rose* :—At the time of the bankruptcy the petitioner virtually held the acceptance of the two *Cowards* for a valuable consideration, and there is nothing to prevent a proof against the estate of the two.

Ordered as prayed.

*Ex parte* BOOTH. — In the matter of KEW.

C. of R.  
Jan. 27,  
1835.

THE bankrupt deposited certain policies of insurance with the petitioner, who, instead of having them sold in the usual way, deducted their full value, and proved for the difference. The assignees brought an action at law for the recovery of the policies. This was a petition to restrain the action.

When assignees have a legal right, the Court will restrain them if they sue against equity.

Mr. *Montagu* for the petition.

Mr. *Rogers*, *contrá*.

*Per Curiam* :—These policies were a pledge which the petitioner could not sell without conversion, unless the assignees consented to the sale; the assignees therefore have a legal right to a verdict, but under the cir-



1835.

*Ex parte*  
Booth.In the matter  
of  
Kew.

cumstances of this case they must be restrained from proceeding. This injunction does not, however, conclude the question of right, as the assignees may present a petition to the Court if they think fit.

Injunction ordered ; costs out of the estate.

C. of R.  
Jan. 27,  
1835.

Where the order of dividend states that a particular assignee is not liable, he will not be included in an order to pay the dividend.

*Ex parte* DAWSON.—In the matter of FINDEN.

THE petition stated that a commission issued against Finden in February 1804, when *Chatfield*, *Sturch*, and *Packer* were chosen assignees ; that, on 25th June 1808, the accounts of *Sturch*, as the sole acting assignee, were audited, and a dividend was declared ; that, about the 28th of Dec. 1813, the account of *Sturch*, as such sole acting assignee, was again audited, when a further dividend was declared ; that, on 27th Feb. 1827, certain trust property had been sold by the assignees, *Sturch* and *Chatfield*, described as the only acting assignees, leaving a balance of 1,276*l.* 10*s.* 6*d.* in their hands, according to a statement signed by them and filed with the proceedings ; that, on or about the 27th of March 1827, the accounts of *Sturch* and *Chatfield* were again audited, and a balance found in their hands of 935*l.* 12*s.* 5*d.*, and that a further dividend of 11*s.* 5*d.* in the pound was declared ; that the petitioners were creditors ; that *Chatfield* and *Packer* are now dead, and *Sturch* is the only surviving assignee ; that *Sturch* and *Chatfield* never made those necessary inquiries and exertions to discover and apprise the creditors who had proved, and who had not been paid the said dividend of 10*s.* 5*d.* The petitioner prayed that *Sturch* might be charged with the dividend of 11*s.* 5*d.* in the pound.



*Sturch* in his affidavit stated, that in the year 1826 he had retired from business, and that, having received information that the estate of the said bankrupt had been increased by an accession of property, he did sign and execute some deeds of conveyance or assignment of certain houses or ground-rents which had been sold by auction; that such deeds were, to the best of his recollection, so signed by him upon the application of Mr. *Cocker*, the solicitor to the commission; that Mr. *John Chatfield* (his co-assignee) was at that time carrying on an extensive business as a timber merchant, and was reputed to be a man of large property; and that the said *John Chatfield* took upon himself the management and disposition of the said newly-acquired property of the bankrupt, and received the purchase money for the same when sold; that he, this deponent, had entire reliance on the stability and integrity of the said *John Chatfield*; that he was at that time upwards of seventy-three years of age, and was living out of business at a great distance from the place of business of the said *John Chatfield*; and he never did at any time receive any sum of money whatever, except the dividend on his own debt, out of the produce of the said sales, out of the said ground-rents or otherwise, on account of the said bankrupt's estate, since the said accession of property in the said year 1826; and that he was never privy to any misapplication by the said *John Chatfield* or by any other person; and that he did not (until a few months ago) know or suspect, nor had he any reason to know or suspect, that any portion of the final dividend which was declared in 1827 had not been paid.

Mr. *Cocker*, the solicitor to the commission, deposed, that the whole of the monies received in respect of the property surrendered to the assignees amounted to the sum of 1,276*l.* 10*s.* 6*d.*; and that a meeting was held by

1835.

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*Ex parte*  
DAWSON.

In the matter  
of  
FINDEN.



1835.

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*Ex parte*  
DAWSON.In the matter  
of  
FINDEN.

the commissioner, to audit the assignees' accounts, on or about the 27th of February 1827, which was attended by *Chatfield* and *Sturch*; and on the examination of the accounts, which had been made out in the name of the said *John Chatfield* alone, as the acting assignee, by *George Roots* esq., now deceased, one of the acting commissioners, he the said *George Roots* objected to the same, and required them to be delivered in the joint names of and to be signed by the said *William Sturch* and *John Chatfield*, although it appeared, by the *viva voce* examination of the said *John Chatfield* and *William Sturch* respectively, that the said *William Sturch* had not received any monies whatever belonging to the said bankrupt's estate, or did otherwise interfere therein; and that all such monies had been paid to the said *John Chatfield* alone, who had undertaken the sole management of the affairs: And deponent saith, the accounts exhibited to the commissioners as aforesaid, and the memorandum of the audit thereof, were altered by deponent or his clerk by the addition of the said *William Sturch*'s name thereto, as one of the accounting parties, according to the directions of the said *George Roots*; and the accounts were, after much discussion, signed by the said *William Sturch* with great reluctance, and under protest, pursuant to the order of the said commissioners; and he believes the said *William Sturch* did not attend any subsequent meeting under the said commission: And deponent saith he verily believes the said *William Sturch* was, in consequence of his great age and infirmities, quite incompetent to take an active part in the said bankrupt's affairs during the period in question; that he signed the several purchase deeds either at his own house in the Regent's Park or at deponent's office, but he never was present when any of the sales were completed, and he received no part of the purchase monies: Saith, the said



*John Chatfield* undertook to pay the dividends to the creditors, and had from the beginning the exclusive control and application of all the trust funds: Saith, the said *William Packer* was resident in the country during the proceedings before mentioned, and never interfered therein.

1835.

—  
*Ex parte*  
DAWSON.  
In the matter  
of  
FINDEN.

Mr. *Mac Lean*, for the petition, contended, that the interlined parts, being made by two commissioners only, were quite inoperative, and cited *ex parte Booth*, Mont. 248, and *ex parte Learmouth*, 1 Dea. & Ch. 491.

Mr. *Montagu*, for *Sturch*, was stopped by the Court.

THE CHIEF JUDGE:—The Court is of opinion that the petitioner is not entitled to what he seeks. The property of the bankrupt is in the hands of the assignees till the order of dividend is made, after which it is money in their hands to the use of the persons entitled, and formerly an action against them must have succeeded on proving the order of dividend. The jurisdiction therein is now confined to this Court. (a) The foundation of the claim is the order of dividend in 1827, on the face of which the commissioners state, that it appeared to them that *Packer* and *Sturch* had not any of the assets in their hands, but that *Chatfield* had. Thus the order of dividend varies from the usual form, the commissioners thinking *Chatfield* alone liable. The words so confining the liability to *Chatfield* are interlined. On a reference to the registrar, he reports that this interlineation was by two commissioners only; it was objected, that, being by two only, it is of no validity; but it happens that the order itself is signed by two only, therefore,

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(a) 6 Geo. 4. c. 16. s. 111. and 1 & 2 W. 4. c. 56. s. 2.



1835.

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*Ex parte*  
 DAWSON.  
 In the matter  
 of  
 FINDEN.

either there is no order of dividend, and then the petitioner is out of court, or the interlineation is good. This is not a petition raising the question, whether *Sturch* be liable notwithstanding the interlineation; it is not a petition for an account against him, &c.

Sir *J. Cross*: — This is an attempt to make *Sturch* suffer for the laches of the petitioner. The question is not whether the order be valid, but whether it can be enforced against *Sturch*; which it cannot.

Sir *G. Rose*: — On petitions for payment of a dividend, the analogy to what would be the course pursued on action is followed up as closely as possible. Strictly, therefore, the assignees might say, the order of dividend was good for nothing, subject to the consideration of how far the Court would permit them to set up a defence founded on a defect in the proceedings of which they have the care, and constructed by their solicitor. Whether the commissioners did right in excepting *Packer* and *Sturch* is another question. If the order of dividend had been recently made, I should be inclined to send it back to the commissioners to reconsider it.

Petition dismissed, without costs. (a)

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(a) See *ex parte Griffin*, 2 Gl. 1 Atk. 90; *ex parte Booth*, Mont. & J. 116; *ex parte Powell*, Mont. 248; *ex parte Healey*, 1 Dea. & Mac. 223; *Lingard v. Bromley*, Ch. 361; *ex parte Learmouth*, 1 Beames, 115; *re Lichfield*, 1 Dea. & Ch. 491. Atk. 887; *Primrose v. Bromley*,



*Ex parte* DICKSON.—In the matter of  
HUTCHINSON.

C. of R.  
Jan. 24,  
1835.

**HUTCHINSON** and Co. drew bills on *Pole* and Co., who accepted them for valuable consideration. *Hutchinson* and Co. indorsed them to *Heaviside* without consideration, and *Heaviside* discounted them with *Wilson* and Co. A fiat subsequently issued against *Hutchinson* and Co., and *Heaviside* and Co. and *Pole* and Co. stopped payment, and executed a trust deed in favour of their creditors. *Wilson* and Co. proved against *Hutchinson* and Co. and *Heaviside* and Co., and came in under the trust deed of *Pole* and Co. By these means *Wilson* and Co. received within 6s. 8d. in the pound of full payment, which was now tendered to be paid by the assignees of *Hutchinson* and Co. if *Wilson* and Co. would deliver up the bills; but *Wilson* and Co. refused, as they had discounted a bill for *Heaviside*, which was drawn by him on and accepted by *Sykes*, without having the names of either *Hutchinson* and Co. or *Pole* and Co. thereto; and *Wilson* and Co. claimed to hold the first bills as security for payment of the bill drawn on *Sykes*.

Hutchinson and Co. drew bills on Pole and Co.; these came to Heaviside, who indorsed them, with other bills to which Hutchinson was no party, to Wilson and Co. The parties became bankrupt. The assignees of Hutchinson and Co. are not entitled to have the note delivered up on paying its amount, the other bill indorsed by Heaviside being unpaid.

Mr. Montagu, Mr. J. Russell, and Mr. Wilson for the assignees of *Hutchinson* and Co.:—As between *Hutchinson* and Co. and *Wilson* and Co., the former have a right to have the bill delivered up. The moment *Wilson* and Co. are paid in full, from the different estates, that moment the estate of *Hutchinson* and Co. is entitled to the benefit of any further dividends which may be paid by the other estates. *Ex parte Barratt*, 1 Gl. & J. 327. The rule is, where a creditor is entitled to prove upon the same instrument against different persons, he is entitled to a dividend under each commission or fiat upon the whole debt proved, till he receives 20s. in the



1835.  
 —  
*Ex parte*  
 DICKSON.  
 In the matter  
 of  
 HUTCHINSON.

pound. (a) But if the whole of any bill is paid by any party to the bill, or partly by other parties, thereto and partly by the assignees under the commission against the debtor, the amount of the sum so paid must be deducted from the proof, and the dividend paid on the residue only. (b)

The assignees of *Heaviside* consented.

Mr. *Burge* and Mr. *Bethell*, *contra*: — There is no jurisdiction to make the order prayed, the application being merely a claim as for so much money had and received, or to be received, to the use of the petitioners. *Ex parte Sammon*, 1 *Dea. & Ch.* 564, shows that they are entitled to prove and retain the bill as they have done. If the respondents part with the bill, they may lose the interest thereon in case of a surplus on any of the estates.

Mr. *Montagu* in reply: — There is jurisdiction, this being a matter of proof and dividend, and this petition being in both the fiats. The Court can make any order

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(a) *Contra*, *ex parte Lefebvre*, *Ves.* 418, upon *ex parte Turner*, 2 *P. Wms.* 407. Overruled, *ex parte Wildman*, 1 *Atk.* 109; *ex parte Rushforth*, 10 *Ves.* 416; *Paley v. Field*, 12 *Ves.* 438.

(b) *Ex parte Burn*, 2 *Rose*, 59; *ex parte Smith*, 3 *Bro.* 1, and *Cooke*, 171; *ex parte Gifford*, 6 *Ves.* 805; *ex parte Barratt*, 1 *Gl. & J.* 327; *ex parte Wallace*, *Cooke*, 156. But see *ex parte Rushforth*, 10 *Ves.* 418. And *quære* whether, from Lord *Eldon*'s observations in *ex parte Rushforth*, 10 *Ves.* 418, upon *ex parte Turner*, 3 *Ves.* 243, and the argument of *Alexander* and *Bell* in *Paley v. Field*, 12 *Ves.* 438, the following is not the correct rule; "If various securities be held for one general debt, not separately applicable to parts, and after proof of these securities under a fiat against one of the parties, the creditor receive full payment of one of the securities from another party to the instrument, the proof thereon is not to be expunged."



touching bills, and the proof made thereon in bankruptcy :  
besides which the assignees of *Heaviside* consent.

1835.

*Ex parte*  
DICKSON.

In the matter  
of  
HUTCHINSON.

Sir *J. Cross* : (a)—The petitioners are assignees ; the respondent, a creditor under a fiat ; the subject matter, a claim to dividends on proofs under a fiat : therefore there may be a jurisdiction. But granting that, Are the petitioners entitled to the relief they pray ? Have they been aggrieved ? Not yet. The petition admits that the respondent has a valid proof on a bill, and states that though tendered a sum they refuse to deliver up the bill. They have a right so to refuse. This differs from *ex parte Barratt*, 1 Gl. & J. 327, as there a grievance existed. This petition must be dismissed.

Sir *G. Rose* :—No authority has been cited to show that this Court has jurisdiction in this case, and in the absence of authority I cannot say the Court has jurisdiction. The case of *ex parte Barratt* is clear, it being quite of course that a bill when paid should be severed. But if there were jurisdiction, this is not a case for interference. If the parties went to equity to have the bill delivered up, they would fail. Then how is it in bankruptcy ? This Court never raises trusts and equities between different sets of assignees ; as the thing falls so it lies ; *melior est conditio possidentis*. Where a party holds several bills, and proves, and some are paid and some not, the Court will sometimes order the bills paid to be delivered up ; but this is a mere matter of convenience, not giving a right to any one, much less as against a stranger. When a party is paid *aliunde*, what right is there to expunge ? Clearly none ; a mere matter of convenience. There are many cases where, as

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(a) The Chief Judge was absent.



1835. between assignees and a creditor, the former may be bound by equities, so as to prevent the operation of a rule that a proof is to be expunged made on a bill paid in full. If in cases like the present the Court interfered, there would be no end of applications, and almost insurmountable difficulties would exist in marshalling the payment of the dividends. If there were a petition to expunge, the equities would not be in favour of the petitioners.

Petition dismissed.

C. of R.  
Jan. 28,  
1835.

*Ex parte* JACOBS.—In the matter of JACOBS.

Unless there are special circumstances, the Court will never allow the petitioning creditor to take out a new fiat before the time for opening has elapsed.

A fiat will not be amended by altering the date to let in a later act of bankruptcy, unless under special circumstances.

A FIAT issued on the 6th of January 1835, and was not yet opened; the time for opening was not yet expired. This was a petition to amend the fiat by altering the date. It stated that the petitioner was not before able to prove an act of bankruptcy, but now was.

Mr. *Anderdon*, for the petitioner, cited *re Roberts*, 3 *Dea. & Ch.* 315, where a similar order to that now asked was made under similar circumstances, the act of bankruptcy there, as here, being lying in prison, and the twenty-one days not being completed when the fiat issued, and he cited *ex parte Hawes*, 1 *Mont. & Ayr.* 708.

*Per Curiam*:—The Court ought not to interfere. The petitioning creditor took out a fiat, without ascertaining whether there were any act of bankruptcy or not, and he offers no explanation; he merely says, he was not before able to prove an act of bankruptcy, and now is.

Mr. *Anderdon* then asked leave to issue a new fiat.



*Per Curiam*:—Unless there are special circumstances, the Court will never allow the petitioning creditor to issue a new fiat before the time for opening has elapsed. The present petitioner may, after that time, come with the common petition for leave to issue a new fiat.

1835.

*Ex parte*  
JACOBS.  
In the matter  
of  
JACOBS.

*Ex parte* LAVENDER.— In the matter of  
LAVENDER.

C. of R.  
Jan. 28,  
1835.

MR. TEMPLE:—In this case the Court have ordered the fiat to be superseded (*a*), and the usual confirmatory order of the Lord Chancellor has been issued. The parties have since discovered facts which they conceive will induce the Court to come to a different decision. The question is, what course to pursue? Whether on the rehearing a Court could order a procedendo to issue, or whether that writ was gone (*b*); and whether this Court could rehear a matter after the Lord Chancellor had issued his order. (*c*)

After a fiat has been annulled by the Chancellor, the Court of Review may rehear and issue a procedendo.

The Court intimated that the course would be to present a petition of rehearing, with a supplemental petition stating the newly-discovered facts; and the procedendo or something analogous, would be found to exist; and that as to the jurisdiction, the Court could make the usual order. (*d*)

(*a*) *Ex parte Lavender, ante*, vol. i. page 699.

(*c*) See *ex parte Anjer*, 2 Dea. & Ch. 67.

(*b*) It was ordered to issue in *ex parte Anjer*, 2 Dea. & Ch. 67.

(*d*) That is, "if the Lord Chancellor think fit."



C. of R.  
Jan. 29,  
1835.

Letters, sent subsequent to the deposit, are sufficient memorandum to entitle to costs on a petition for sale of an equitable mortgage.

*Ex parte* REYNOLDS.—In the matter of MOORE.

**T**HIS was the common petition by an equitable mortgagee. The question was, whether there were sufficient written evidence of the deposit as to entitle the petitioner to costs. No memorandum was made at the time of the deposit, but two letters, written subsequently, clearly recognized the deposit.

Mr. *Flather*, for the petition, cited *ex parte Reid*, 1 *Dea. & Ch.* 250.

Mr. *Bichner* for the assignees.

*Per Curiam* :—There is sufficient to entitle the petitioner to costs. The principle is, that there must be sufficient written evidence for the assignees to go by.

Ordered.

C. of R.  
Jan. 30,  
1835.

Perpetual injunction issued to restrain the bankrupt proceeding at law to invalidate a commission issued ten years back, after actions and unsuccessful petitions, and acts of acquiescence.

*Ex parte* WHITE.—In the matter of BRITTAIN.

**T**HIS was a petition by the assignees to restrain the bankrupt from continuing an action to invalidate the commission.

The petition stated, that prior to the year 1823 the bankrupt carried on the trade of a calenderer in London; that in 1823 he executed a warrant of attorney to or in favour of his father for 10,000*l.*, and that judgment was immediately entered up, execution issued, and the property assigned to *Daniel Brittain* the elder; that, notwithstanding the executions, the bankrupt continued in possession to December 1824; that the bankrupt was largely indebted when he executed the warrant of attorney; that on the 21st December 1824 a commission



issued against *Daniel Brittain*, by the contrivance of the said *Daniel Brittain*; that the petitioning creditors were *Daniel Brittain* the father and *Daniel Brittain* the younger; that *Daniel Brittain* the elder proved a debt of 18,000*l.*, was chosen assignee, and immediately afterwards signed the bankrupt's certificate; that no dividend was ever paid; that the bankrupt obtained his certificate on the 12th of March 1825; that on the 13th or 15th of May 1825 *Daniel Brittain* the elder executed a deed of gift to or in favour of the said bankrupt, of all the property at Tenter Street which had been taken in execution; that the bankrupt continued in the possession of such property until January 1826; that on the 19th and 20th of January 1826 the bankrupt sold a great part of his furniture, and realized a large sum of money; that shortly the bankrupt removed to Bashley Lodge, Hants, where he took a mansion-house and a large domain, and kept a very expensive establishment; that about November 1827 a distress for rent was made on the effects of the bankrupt at Bashley; that the bankrupt sold his effects at Bashley, and received the proceeds, and quitted the place; that the bankrupt was several times arrested, and on one occasion escaped from the sheriff's officer, and quitted the county; that the bankrupt contracted debts to a considerable amount during his residence at Bashley Lodge, all of which he left unpaid; that immediately after the bankrupt absconded he went to London, and, being fearful of arrest, assumed the name of *Grange*; that shortly afterwards he left England with his family, and went to Brussels; that about the 17th day of February 1831 a commission was issued against the said *Daniel Brittain*; that on the 12th of March 1833 the bankrupt duly surrendered to and claimed his protection, and requested an allowance to be made to him by way of maintenance; that the com-

1835.

—  
*Ex parte*  
WHITE.  
In the matter  
of  
BRITTAIN.



1835.

—  
*Ex parte*  
 WHITE.

In the matter  
 of  
 BRITAIN.

missioners, with the consent of the assignees, ordered the sum of 60*l.* to be paid for that purpose; that the bankrupt employed *Pullin* and Son to act for him, who, about the 17th of March 1833, informed the solicitor to the assignees, and proposed that the accounts of the bankrupt in the partnership concern of *Perritt* and *Watts* should be examined, and to which the assignees assented; that Mr. *Hussey* was on the part of the bankrupt, and Mr. *Howell* on part of assignees; that eleven weeks were occupied in examining the accounts of the partnership, and during such period the bankrupt from time to time attended the examination of the accounts; that the bankrupt called on the solicitor to the petitioner on various occasions, and gave him information as to the estate and assets to be received, particularly as to a sum of 3,000*l.* owing by one Mr. *Bailey*, whom he requested might be summoned before the commissioners; that about the 11th of April 1831 the bankrupt brought a letter to the petitioner from Mr. *Dampier*, which requested the petitioner, in case the bankrupt asked him to sign his certificate, to do so, and to use his the petitioner's influence in getting his neighbours to do the same; that on the 12th of April 1834 the bankrupt passed his last examination; that the bankrupt, from the time of issuing the commission, and up to the time of passing his last examination, fully acquiesced in the commission and the proceedings of the assignees, and that upon various occasions he had been engaged in assisting his assignees to oppose proofs, and particularly the proof of a debt claimed by one *Curtis*, which, upon the evidence of the bankrupt, was rejected; that *Curtis* thereupon presented a petition to prove; that one of the allegations in such petition was, that the commission had been duly issued against the bankrupt; that the bankrupt read over with the petitioner such petition, and



denied the existence of the debt claimed by *Curtis*, and made an affidavit in opposition thereto; that most of the creditors mentioned in the list given in by him, whose debts amount together to the sum of 3,222*l.* 9*s.* 5*d.*, proved; that on the 26th of April 1831 the bankrupt wrote a letter to the assignees, soliciting a further advance for maintenance, having been, as he stated, deprived of every thing by the attack on Brussels:—saying, “In appealing to you, I cannot but hope you will please to place my situation before those gentlemen appointed assignees to my estate, who, I feel a confident hope, will exercise their influence with the general creditors to procure me some alleviation of the horrors that now surround me, by relieving the necessities of my numerous family:” — that the statement in the said letter as to the loss by the attack was false; that the assignees discovered, that before the bankrupt quitted Brussels he had pledged a quantity of plate and jewels; that on the 18th of June a dividend of 2*s.* was declared, on which day a petition was presented by *Pullin* and Son, the then solicitors of the bankrupt, to supersede the commission; that *Pullin* and Son had proved and signed the bankrupt’s certificate; that such petition was presented in collusion with *Daniel Brittain*; that the petition was not served upon the assignees until the 2d of July 1831, when the dividend of 2*s.* in the pound was paid; that on the 11th of August 1831 a petition was presented by the bankrupt to supersede, on the ground that the commission was fraudulent, and that he was not truly described, that he had never committed any act of bankruptcy, and that there was no debt due to the petitioner; that the two petitions were heard before the Vice-Chancellor, who on the 26th of November 1831 dismissed them with costs, but that the costs had never been paid; that on the application of Messrs. *Pullin* and

1835.

—  
*Ex parte*  
WHITE.  
In the matter  
of  
BRITAIN.



1835.

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*Ex parte*  
WHITE.In the matter  
of  
BRITTAIN.

Son their petition was reheard before the Lord Chancellor, and occupied nearly two days, and was again dismissed; that on the 18th of April 1832 the bankrupt presented his petition of appeal, which on the 2d of August 1832 was dismissed with costs; that the costs, amounting to a large sum, had not been paid; that the assignees proceeded immediately to prepare for a further dividend; that on the 9th of August an advertisement was inserted in the Gazette, to take into consideration a proposal for the purchase of the plant and machinery at Tenter Street; that a meeting was held on the 31st of August, and the sale sanctioned by a large body of the creditors; that no opposition was urged to the sale on behalf of the bankrupt; that on the 4th of September 1832 a further dividend meeting was held; that at such meeting *Jane Brittain*, the wife of the bankrupt, attended by her solicitors, and claimed to be admitted to claim or prove a debt of 8,000*l.* upon the bankrupt's bond; that after such meeting for a dividend was over, and in order to prevent the funds being divided, a notice was served on behalf of the said *Jane Brittain*, claiming the property; that a further meeting for a dividend was advertised for the 2d of March 1833, but the notice not being withdrawn, a deposition was made by the assignee as to the notice, and that he could not safely pay the dividend declared; that on the 10th of September 1831 *Jane Brittain* called on Messrs. *Perritt* and *Watts* to pay 254*l.* 1*l.* 4*d.* rent for the premises at Tenter Street, and made an affidavit of debt, and arrested *Perritt* and *Watts* for that amount, but never proceeded therein; that this was the first claim ever set up or pretended to be set up by her, or any one on her behalf; that the bankrupt had not mentioned her alleged debt of 8,800*l.* in his last examination; that the claim of the said *Jane Brittain* was rejected, but the meeting for a



further dividend adjourned ; that the bankrupt was the real party attempting to prove such debt of 8,800*l.*; that *Jane Brittain* did not make any further attempt to claim the 8,800*l.*; that on the 4th of September 1832 it appeared that the bankrupt had concealed and removed to Belgium all his books, jewels, and plate, and a harp and other effects; that an indictment for embezzlement was, at the spring assizes, preferred by the assignees against the bankrupt; that the indictment was tried at the assizes, but the bankrupt was acquitted, the assignees having failed in proving the loss of the replevin bond, on which the petitioner paid the money as the bankrupt's surety, as heretofore mentioned, so as to entitle the assignees to give secondary evidence of such bond; that since the examination on the 4th of September 1832, and the indictment, the bankrupt hath frequently declared that he would ruin all the parties by his proceedings; that on 31st of July *Daniel Mallett Brittain*, acting as aforesaid under the control and at the instigation of the bankrupt, commenced an action at law in the Court of Exchequer against *Charles Perritt* and *Thomas Watts*, and held them to bail for 2,354*l.*, the amount claimed, and such action is now at issue; that *Daniel Mallett Brittain*, acting under the control and at the instigation of the bankrupt at the time, commenced an action of trover in the Court of Exchequer to recover the value of the plant and machinery, and *Daniel Mallett Brittain* (suing in *formâ pauperis*) applied to one of the Judges of the Court for an order to hold Messrs. *Perritt* and *Watts* to bail for the sum of 4,267*l.* 11*s.* 10*d.*, the alleged value of the said plant, but such application was refused; that such last-mentioned action was then at issue, but the proceedings of both of such actions were at present stayed by an injunction in Chancery; that in Trinity

1835.

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*Ex parte*  
WHITE.

In the matter  
of  
BRITTAİN.



1835.

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*Ex parte*  
 WHITE.

In the matter  
 of  
 BRITAIN.

Term 1833, and immediately after the injunction had been obtained, the bankrupt himself (suing *in formá pauperis*) brought an action at law against the assignees and the solicitor to the commission to recover in trover the value of the books and effects brought over from Holland ; that the last-mentioned action stood for trial, but was made a remanet, and was tried on the 5th of July last, when the bankrupt was nonsuited ; that the object of the bankrupt in bringing such last action was again to put in issue the validity of the commission ; that the expenses of preparing for the trial, and taking the same into the Court, upon the part of the petitioner and his co-assignees, amounted to nearly 800*l.* ; that on the 16th of July last (being eleven days after the nonsuit) the bankrupt commenced an action of trover in the Court of Common Pleas to recover the books, and also a gold watch ; that the bankrupt discontinued such last-mentioned action, but had not paid the costs thereof ; that the object of such last-mentioned action was again to put the validity of the commission in issue ; that the bankrupt had since commenced another action at law to recover in trover the value of a gold watch and plate, &c. ; that the object of the last-mentioned action was again to dispute the commission ; that the action was set down for trial at Guildhall for the 13th day of December ; that the bankrupt had declared to various persons that he never should have instituted or brought the aforesaid actions, or harassed the petitioner or his co-assignees, but on account of the said prosecutions, and hath expressed himself on such occasions to the effect that he might be better, but could not be worse off.

The petition prayed that the bankrupt might be restrained from all further proceedings in the action, and perpetually restrained from all other proceedings to impeach or supersede the commission.



Mr. *Swanston* and Mr. *Montagu*, for the petition, stated that this was a petition to restrain the most vexatious litigation, and after repeated acquiescence.

1835.

*Ex parte*  
WHITE.  
In the matter  
of  
BRITAIN.

Mr. *Twiss* for the bankrupt : —

The plaintiff sues *in formá pauperis*, and the proper application is to the Court in which the action is pending, to dispauper him, which is done when vexatious litigation is pursued.

The defence on this petition rests on three grounds. First, The assignees say they have a good defence at law ; if so, they are not entitled to an injunction here, which only issues when there is no defence at law, but equitable circumstances exist which render the action improper. Second, There has already been one verdict in favour of the bankrupt in the Exchequer. Third, The commission was taken out to dissolve a partnership, and for no other purpose, and is therefore bad (a), and the Court will not lend its aid to support it. There was a motion in the Exchequer to dispauper the plaintiff in the first action, and to stay proceedings in the second. The same facts were relied on then as are relied on now in support of this petition. The motion was however refused ; the matter is therefore *res judicata*.

[Sir *J. Cross* : — There have been four petitions to supersede. Surely this is an equitable ground on which the Court may act, although the Court of Exchequer could not.]

The Court of Exchequer might have dispaupered the bankrupt. The verdict was against the assignees ; they appeal, a second action was brought, and now they come to this Court. The nonsuit against the bankrupt was

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(a) *Ex parte Christie, Mont. & Bl. 514.*



1835.

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*Ex parte*  
 WHITE.  
 In the matter  
 of  
 BRITAIN.

not on the merits, but on a point of law as to trover and conversion. In *ex parte Bryant*, 2 *Rose*, 4, the Lord Chancellor said, “ This Court will undoubtedly enjoin a bankrupt from vexatiously and repeatedly bringing actions against his assignees ; but I not believe that it was ever considered that his failure in the first action was a reason for interposing against a second.” In the present case there never was, substantially, even one action tried, the first being decided on a point of law, the second discontinued and the costs paid, and the third they now endeavour to stop. As to the petitions already dismissed, does that furnish a sufficient ground to restrain a common law right ? The parties do not come here with clean hands, as this is really the petition of *Perritt*, the late partner of the bankrupt.

Another ground of defence is, that there are equitable circumstances against the validity of the commission. [THE CHIEF JUDGE : — You cannot state them without a cross petition.] That is to declare that the bankrupt cannot elect to proceed at law, but must come here. [THE CHIEF JUDGE : — The equitable grounds are of no use at law, and therefore no ground for resisting the order asked, however good they may be on a petition to supersede.]

Several other points of Mr. *Twiss*’s argument are not here noticed, being referred to in the judgments.

Mr. *Swanston* in reply was stopped by the Court.

THE CHIEF JUDGE : — The injunction must go. The bankrupt is proceeding at law vexatiously, after long acquiescence, and decisions against him by the Lord Chancellor. That there is a good defence at law is not always a ground for refusing the injunction in a case



like the present. It is the duty of the Court to interfere where, as here, though the assignees may have a good defence, yet the only consequence of allowing the action to proceed will be throwing expense on the estate. Besides, some of the proceedings were not to be found on the criminal trial. That may still be the case. It is clear, from an inspection of the proceedings, that the bankrupt acquiesced in, if indeed he was not the party to issuing, the commission; he never made any objection of any kind; he applied for his allowance — though that alone is not acquiescence enough — and asked the assignees to pay a sum to his partner that he might get 60*l.*; he tried to procure his certificate; he brought from his solicitor a letter, asking for intercession with his friends, and it is not pretended that he was ignorant of the contents of that letter. All these are acts of acquiescence. The petition before the Vice-Chancellor, although dismissed upon a point of form, was heard on appeal, and dismissed. It is urged, that this dismissal was, because the bankrupt's affidavit in reply was not filed. But if he had any merits he would have stated them in support of his petition, or might have had a rehearing; and the Chancellor showed his opinion of the merits by dismissing with costs, which is unusual. It appears to me, therefore, that there exist ample grounds for restraining the bankrupt from trying the question of the validity of a debt he always admitted, and inserted in his balance sheet. It was next insisted that the commission was sued out in fraud of the bankrupt laws. All that was before the Lord Chancellor on the former petitions, and might now be brought before this Court on a petition to supersede. Another objection is, that it was taken out solely to dissolve a partnership. The evidence is not strong enough to sustain the objection. The petitioning creditor's debt is ob-

1835.

*Ex parte*  
WHITE.  
In the matter  
of  
BRITAIN.



1835.

*Ex parte*  
WHITE.In the matter  
of  
BRITAIN.

jected to; but it appears to me that the petitioning creditor had a good debt, and that he had a *bona fide* intent to work the commission, in which case the addition of the improper motive of dissolving the partnership would not be an objection. (a) The next proposition of the respondent is, that this, being *res judicata*, is a bar to our interference, or such a guide to our judicial discretion as to induce us not to interfere. It is not a bar. The facts are as follow: — A motion was made to dispauper the defendant, and, as ancillary thereto, that the second action might be stayed. A reference to the master was ordered. While there, the defendant to the second action withdrew from the rule, and then he of course had to pay all costs. This was not such a decision in favour of the bankrupt as to conclude this Court. Nor is it a guide to our discretion. The Court of Exchequer merely discharged the rule because the defendant withdrew therefrom. It is therefore due to the assignee so to restrain the bankrupt from trying the validity of the commission in this the present or in any future action.

Sir *John Cross*: — Never was an instance of more groundless and vexatious litigation; four petitions in Chancery, all failing; and three actions, in two of which he fails, and now he brings a third; not to mention two other actions which it is alleged the bankrupt instigated his son to bring; and it does not appear how he was able to defray the expense of all this litigation, unless out of funds he ought to have given up to the assignees. There never was a stronger case of acquiescence; he takes his allowance, to which he would have no right if the commission were invalid, stands by and assists the assignees

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(a) See *ex parte Christie*, *Mont. & Bl.* 329.



during eleven weeks in settling the partnership accounts ; six months after this, however, it is discovered that he had concealed some of his effects ; in consequence, he cannot procure his certificate ; then come the petitions to supersede, *Pullin* presents one and the bankrupt another, and it is stated the bankrupt was privy to *Pullin's* ; they are both dismissed with costs. The bankrupt was heard before the Lord Chancellor, and the very question now to be tried at law has been thrice decided, twice by the Vice-Chancellor, and once by the Lord Chancellor. As to the actions, the bankrupt was nonsuited in the first, the second was withdrawn, and a third is now commenced. Not to interfere would be to leave the assignees at the mercy of the bankrupt suing in *forma pauperis*. I concur that the injunction must issue.

1835.

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*Ex parte*  
WHITE.  
In the matter  
of  
BRITAIN.

Sir George Rose : — I never saw a plainer case for an injunction. It was long in dispute, Whether the injunction should issue on petition in bankruptcy, or bill in equity ? but it is now settled to be by petition in bankruptcy. (a) These cases involve two propositions, First, Whether the conduct of the plaintiff enables the Court to restrain the action on general principles of equity ? Second, Whether the Court would supersede on his petition ? As to the first, although there might be such fraud in the commission that it would be supersedeable, yet, if the conduct of the plaintiff would lead to the injunction on general principles, this Court would issue it, the assignees being looked at as trustees whose conduct has been sanctioned by the *cestuique trust*, the bankrupt, and therefore have a claim to the protection of this

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(a) *Ex parte Hill*, Mont. 9.



1835.

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*Ex parte*  
WHITE.  
In the matter  
of  
BRITAIN.

Court. Second, If the Court perceived that the bankrupt might succeed at law, but that this Court nevertheless would not supersede, then it would issue the injunction, because the succeeding at law is recovering on an execution, goods which, if the commission be not superseded, the assignees may seize again. Therefore, rejecting all consideration of fraud, the question here is, Was there such a dealing between trustee and *cestuique* trust as would enable the Court to interpose? Generally speaking, a bankrupt taking his protection and allowance are not conclusive acts of acquiescence; the allowance here was however taken under peculiar circumstances, which alter the case. There was a complete acquiescence in all the acts of the assignees, down to a certain time. If the bankrupt petitioned to supersede, we would not supersede under the circumstances of this case. All the facts were known to the bankrupt in 1831, and were not put forth till now. The dismissal of the former petitions is not quite conclusive against the bankrupt, but could we order the supersedeas while the former orders stood? Must they not be first displaced, either by a rehearing, or a supplemental petition? Therefore, on the general principles, as between trustee and *cestuique* trust, and as the Court would not supersede, this injunction must issue.

Injunction issued, restraining the bankrupt continuing the present or bringing any other action to try the validity of the commission.



*Ex parte* LAVENDER.—In the matter of  
LAVENDER.

C. of R.  
Feb. 16,  
1835.

IN this case the fiat had been ordered to be annulled, see 1 *Mont. & Ayr.* 699, and *ante* page 14. This was a petition stating that since the original petition was presented other facts had been discovered, and praying that the order annulling the fiat might be reversed, and a *procedendo* issue, or that a new fiat be issued, or that the former petition might be reheard.

The general rule is that a petition may be reheard on newly discovered facts.

But a petition for supersedeas or to stay the certificate cannot be reheard on new evidence.

Mr. *Temple* and Mr. *Booth*, for the petition: — Read the affidavits, and argued that they proved that the bankrupt had absented himself with intent to defeat or delay his creditors; that the bankrupt had induced the Court to make the former order by perjury; and that on the present petition he declined to make any affidavits; and they asked that a *procedendo* might issue, as was done in *ex parte Anjer*, 2 *Dea. & Ch.* 67, which showed that, though the Lord Chancellor had confirmed the order to annul, yet this Court could make the usual order “if the Lord Chancellor think fit.” (*a*)

Mr. *Whitmarsh*, for the bankrupt, submitted to any order the Court might make.

Sir *John Cross*: (*b*)—The petitioning creditor comes here four months after the former order to ask a rehearing, and the alleged bankrupt has been during that time dealing with his property, and the public with him, on the faith of that order. The Court are now called on to annul that order, on evidence which might have been produced before. A new trial cannot be had at law, because

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(*a*) See *ex parte Hurd*, *Buck*, 45. *Ex parte Crump*, *Buck*, 3. *Ex parte Freeman*, 1 *Ves. & Bea.* 34. S. C. 1 *Rose*, 380.

(*b*) The Chief Judge was absent.



1835.

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*Ex parte*  
 LAVENDER.  
 In the matter  
 of  
 LAVENDER.

fresh evidence has been discovered since the verdict, but only when the other side produced evidence which took their adversary by surprise. Was it ever known that a *procedendo* issued on new evidence, unless the bankrupt kept it back? (a) If a distinct and clear case of perjury on the part of the bankrupt had been proved, my judgment might be different; but the perjury is not proved. It is not shown that any inconvenience will accrue to the creditors at large by the supersedeas, or that any benefit will accrue to them by this fiat standing. Therefore, under all the circumstances of this case, there is not enough to entitle the petitioner to any part of the prayer of her petition, except that she may, if she please, take out a new fiat.

*Sir George Rose*: — Four months ago the bankrupt came with as strong a case as I ever heard, and stating, in the most forcible terms, the ruin that would ensue if the fiat stood; he now consents that it should stand, and I now perceive that he might desire that a sufficient time might elapse to protect the execution. As a general proposition, a rehearing in bankruptcy may be had on evidence discovered since the hearing; but a petition to stay the certificate, or a petition for a supersedeas, cannot be so heard. So far as law is concerned, a petitioning creditor may issue any number of fiats, but this Court would not allow that to be done, in the face of a supersedeas, without leave, otherwise all a trader's dealings might be upset by a succession of dockets, and he ruined. In this case the petitioning creditor may have leave to issue a new fiat.

Petition dismissed with costs, without prejudice to the petitioning creditor's right to issue a new fiat.

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(a) See *ex parte Freeman*, 1 Ves. & B. 34. S. C. 1 *Rose*, 380.



*Ex parte* JARMAN. — In the matter of THEED. (a)

C. of R.  
Feb. 17,  
and  
March 17,  
1835.

THE petition stated that the petitioner was a creditor of the bankrupt on a bill drawn by *Bentley*, accepted by the bankrupt, and endorsed to the petitioner, in consideration of goods sold to the amount of 80*l.* and 220*l.* by a check; that the said sum of 300*l.* became due on the 28th of December 1833, and remained and was then wholly due with interest; that the bankrupt is described in the fiat as “*Thomas Theed*, of No. 43, West Square, in the county of Surrey, late of Hans Place, Sloane Square, in the county of Middlesex, picture-dealer, dealer and chapman;” that he never was a picture-dealer or engaged in any trade, nor a trader; that he never resided in West Square; that his place of residence was Hans Place; and that, for the purpose of misleading the creditors, he took a lodging in West Square for the purpose of a fictitious trading; that, previous to issuing the fiat, he was a member of the University of Cambridge, and lived in London as a gentleman in the best style of society; that, having contracted debts to a considerable amount, he caused the fiat to be issued for the purpose of clearing himself from such debts, and of injuring and defrauding his *bonâ fide* creditors; that *Bentley*, who drew such bill, before its maturity himself became bankrupt, and proved the trading of *Theed* to support *Theed*’s fiat; that the petitioning creditor was a picture-dealer and a most intimate friend of the bankrupt, and was appointed sole assignee; that *Theed* had obtained his certificate, and that the same lay before the Court for confirmation; that the only person who signed the certificate was the petitioning credi-

A person whose debt is alleged to be usurious cannot petition to annul the fiat for fraud, or stay the certificate.

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Vivâ voce examinations.

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(a) Before Sir John Cross alone.



1835.

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*Ex parte*  
JARMAN.  
In the matter  
of  
THEED.

tor; that there was no estate to be divided under the fiat; that the bankrupt had for some years past frequented horse races, and had been extensively engaged in gaming and wagering; that he had lost by wagering or gaming in one day 20*l.*; that he had lost within one year preceding his bankruptcy, at Epsom races, by gambling, the sum of 200*l.*; that he lost within one year next preceding his bankruptcy, at Ascot races, by gaming, the sum of 200*l.*; that the petitioner could prove the various facts, by the evidence of one *George Alderson*, as well as by the evidence of other persons, and hath applied to him to make such affidavit, but he refuses so to do.

The petition prayed that the adjudication of the bankruptcy of the said *T. Theed* might be reversed, and that the said fiat might be forthwith rescinded and annulled at the costs of the petitioning creditor; and that, upon the hearing of the petition, the petitioning creditor, the bankrupt, and *G. Alderson*, might be personally examined; or that, if the fiat was not annulled, the certificate might be stayed.

It was alleged by the affidavits in opposition, that the 80*l.* worth of goods given as part of the bill was done as a cloak to procure more than five per cent. on the discount, thus rendering the debt of the petitioner usurious; the petitioner denied this.

Mr. *Montagu*, for the petitioner, argued that there was no trading to support the fiat; that the fiat was fraudulent, and the certificate bad, the bankrupt having lost at gaming; and concluded, that if there were any doubt on the mind of the Court as to these points, that there might be a *vivâ voce* examination as prayed.

Mr. *Bethell*, for the assignees, objected to a *vivâ voce* examination. The rule is, that the party must make an



express preliminary application, and not first feel the pulse of the Court; and that filing affidavits in reply is a waiver of the right. *Ex parte Baldwin*, 1 Mont. & Ayr. 617.

1835.

*Ex parte*  
JARMAN.

In the matter  
of  
THEED.

Mr. *Chandless* and Mr. *Cooke*, for the bankrupt, also contended, on the authority of *ex parte Baldwin*, 1 Mont. & Ayr. 617, that the petitioner could not now have a *vivâ voce* examination.

Mr. *Montagu* in reply:—In *ex parte Thompson*, ante, page 40, the Court declared that no general rule was laid down in *ex parte Baldwin*, 1 Mont. & Ayr. 617, that the party was positively estopped from having a *vivâ voce* examination, because the affidavits were read, for that though such was the general rule, it must bend to circumstances, as it did in *ex parte Aughtie*, ante, page 28, where a *vivâ voce* examination was asked and finally had, though full affidavits had been filed on both sides.

Sir *John Cross*:—On these occasions the expense is not to be lost sight of. The first question now is, Whether the necessity of what is asked is shown? Now, under all circumstances, I think no case has been made out to authorize the expense and delay consequent on ordering the petition to stand over. But if any of the parties were in Court, I would allow them to be examined.

Mr. *Bethell*, for the assignees, then objected that the debt of the petitioner was usurious, part only having been advanced in money, and part in pictures; the debt being usurious, was no debt, and therefore the party was not a creditor, and could not petition to supersede.



1835.

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*Ex parte*  
 JARMAN.  
 In the matter  
 of  
 THEED.

Mr. *Montagu*, *contra*: — Assuming the debt to be usurious, yet if a petition to supersede disclose a case of gross fraud, the Court are not astute to discover or support such preliminary objections, and would not part with the petition when once before the Court, as was said in a late case, where a similar objection was taken. (a)

Sir *John Cross*:—In *ex parte Hudson*, 2 *Russ.* 456, the same preliminary objection was taken and allowed (b), and though it is clear that this is a fraudulent fiat, taken out merely for the purpose of whitewashing the bankrupt, nevertheless I at present feel myself bound by that case. But I wish time to consider.

*Cur. ad. vult.*

March 17. This day the Court gave judgment.

Sir *John Cross*:—I have mentioned the facts of this case to the Court. I remain of opinion that the petitioner is not a creditor, his debt being usurious, and that therefore he cannot petition.

*Per Curiam*:—The petition is dismissed, without costs.

Dismissed, without costs. (c)

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(a) *Ex parte Taylor*, *ante*, creditor, and supported his allegation by affidavit. It was objected he was not in fact a creditor, and therefore could not petition. Held, the allegation and affidavit were enough, if he shows by circumstances that he is a creditor.

(b) An inquiry was directed as to the fact.

(c) *Ex parte Tolson*, in *re Score*, Lord Chancellor, Dec. 12, 1826. This was a petition to stay the certificate, and supersede. The petitioner alleged he was a



*Ex parte* VERE and Co.—In the matter of BENTLEY and Co.

C. of R.  
Jan. 31, &  
March 13,  
1835.

**T**HIS was a petition to prove on a bill for 10,000*l.*, accepted by the bankrupts, and delivered to *Gomersall* and *Gandell*, and by them indorsed, and deposited with the petitioners, under the circumstances mentioned in the petition.

Bentley and Co. accepted an accommodation bill for *Gomersall* and Co., who indorsed it to Vere and Co., and deposited it with them as security for advances. Held: Vere and Co. may prove the amount against Bentley and Co.

The petition stated, that from May 1833 to September 1834 the petitioners were bankers to *Gomersall* and *Gandell*, bill-brokers; that the petitioners agreed to discount bills for *Gomersall* and *Gandell*, who wrote the following memorandum or guarantee: — “London, 5 mo. 1st, 1833. *Vere, Sapte*, and Co. Esteemed Friends, We engage to guarantee all bills you may discount for us from time to time from the date hereof, unless any engagement is made to the contrary. We are, your assured friends, *Gomersall* and *Gandell*.”

In March 1834 *Gomersall* and *Gandell* applied to the petitioners to assist them with loans to the amount of 20,000*l.*; and *Gomersall* and *Gandell* undertook to give the petitioners their promissory note for 20,000*l.*, and to lodge bills and securities to the amount of 10,000*l.*, which were to remain in the possession of the petitioners until due; and further, to deposit, on the evening of every day, bills, notes, and other securities, to the amount of 10,000*l.* at least, which last were to be taken out every morning and used by *Gomersall* and *Gandell* in the course of their business; but the same, or other bills and securities to an equal amount, were to be substituted for, and to be returned to, and deposited with the petitioners, on the evening of every day; and *Gomersall* and *Gandell* further undertook to have a standing cash balance of 4,000*l.* in the hands of the petitioners



1835.

—  
*Ex parte*  
 VERE.

In the matter  
 of  
 BENTLEY.

on the close of every day's transactions, on the account between them and the petitioners.

That these terms were agreed to, and also that as well the promissory note for 20,000*l.* as the bills and securities first mentioned amounting to 10,000*l.*, and also the second-mentioned bills and securities to the amount of 10,000*l.* at the least, and also such standing cash balance as aforesaid, should be for repaying the advance of 20,000*l.*, and for indemnifying the petitioners against any loss which they might sustain either in respect of the last-mentioned advance or in respect of any other advance to be made, or otherwise in respect of the account kept by the petitioners as bankers.

That thereupon *Gomersall* and *Gandell*, on the 20th of March 1834, delivered to the petitioners the following agreement: — “ London, 3d mo. 20th, 1834. *Vere, Sapte, and Co.* Esteemed Friends, It is our wish to have a permanent loan with your firm of 20,000*l.*, against which we are anxious to give you that security that even under the most unlikely and disastrous circumstances you would be protected, which we consider you will be, by lodging the following, viz. the joint note of our firm for the full amount of the loan, and as collateral security, we will deposit 10,000*l.* in bills, not to be moved, and 10,000*l.* ditto, to be with us during the day; and further, a standing balance in the accounts every night of 4,000*l.* We are, respectfully, your friends, *Gomersall* and *Gandell*, Lombard Street.”

That in pursuance of such agreement *Gomersall* and *Gandell* continued to draw on the petitioners up to and inclusive of the 20th of September 1834, and that the transactions between the petitioners and *Gomersall* and *Gandell* were closed up to the end of every day, and that for the whole amount which had, at the close of each day, been then lent and advanced, and for the



clear balance remaining due, the cash balance, and the said several bills and securities, including the bills and securities so returned or substituted at the close of each day, were considered, on the footing of the agreement, to be the property of the petitioners, as a security for the whole sum due to them; and the petitioners were at liberty, if the state of the account rendered it expedient, or if the petitioners thought it expedient, to refuse to redeliver to *Gomersall* and *Gandell*, on the morning of each or any of the said days, the securities so deposited and lodged with the petitioners.

That on the morning of the 20th of September 1834, when the business of the petitioners bank commenced, *Gomersall* and *Gandell* were indebted to the petitioners in 35,516*l.* 12*s.* 8*d.*, and the petitioners had in their hands cash of *Gomersall* and *Gandell* to the amount of 1,993*l.* 16*s.* 10*d.*, and no more; and that the promissory note for 20,000*l.*, and the other bills and securities permanently lodged, remained in the petitioners hands, and that they had also in their hands bills and securities of which *Gomersall* and *Gandell* were to have the use during the day, amounting to 14,294*l.* 6*s.* 1*d.*; that the last-mentioned bills were delivered out by the petitioners in the ordinary course of business, and on the footing of the said agreement to *Gomersall* and *Gandell*; that various payments were made by the petitioners to the order and on the account of *Gomersall* and *Gandell* during the day, and that at the close thereof *Gomersall* and *Gandell* were indebted to the petitioners in 35,386*l.* 12*s.* 8*d.*, and the cash balance of *Gomersall* and *Gandell* amounted to 6*l.* 0*s.* 4*d.*, and no more.

That shortly before the closing of the said bank on the evening of the 20th of September, *Gomersall* and *Gandell* sent divers bills and securities on the footing of the agreement, some of which were the same as those

1835.

—  
*Ex parte*  
VERE.

In the matter  
of  
BENTLEY.



1835.

*Ex parte*  
VERRE.In the matter  
of  
BENTLEY.

which had been delivered out to them in the morning, and others were substituted for such as had been transferred or disposed of in the course of business, and that *Gomersall* and *Gandell* at the same time sent a message to the effect, that as they had used and transferred some of the bills, and had also drawn out the cash balance which they ought to have left, they had given additional security by means of the bills and securities so delivered to and lodged with the petitioners.

That the bills and securities lodged on the evening of the 20th of September amounted to 22,666*l.* 14*s.* 2*d.*, and that among them was a promissory note, dated the 15th of September 1834, whereby the said bankrupts promised to pay to *Gomersall* and *Gandell*, or order, three months after date, 10,000*l.* for value received, and which was indorsed by *Gomersall* and *Gandell*, and by them made payable to the petitioners.

That the account between the petitioners and *Gomersall* and *Gandell* was closed on the evening of the 20th of September 1834, and the petitioners had not since made any advance of money to them, but hold and retain the several securities above mentioned, including the promissory note for 10,000*l.*

That a fiat issued against the bankrupts on the 30th of September 1834.

That the bankrupts were indebted to the petitioners in 10,000*l.*; and petitioners tendered a proof, including the debt due to them on the promissory note, before Mr. Commissioner *Evans*, who rejected the same as respected the promissory note, and decided that the petitioners had no right to make any proof against the estate in respect thereof.

Mr. *Swanston*, Mr. *Bethell*, and Mr. *Bacon* for the petition:—This is a petition to prove on a bill of ex-



change, deposited with the petitioner as a security by *Gomersall* and *Gandell*. The defence is, that the bill came into the hands of *Gomersall* and *Gandell* without consideration, and that the deposites, the petitioners, cannot be in a better situation than the depositor. *Bentley* deposited the bill with *Gomersall* and *Gandell*, it is said, without authority, but the petitioner dealt exclusively with *Gomersall* and *Gandell*. Bills are negotiable instruments, and there was nothing on the face of these bills to excite inquiry; if any one must suffer, it is not the petitioners. But the petitioners depend on the special contract also, in consideration of which these bills were deposited. [Sir G. Rose:—The objections are, want of consideration and fraud on the part of *Bentley*. The agreement makes the petitioners trustees of the note for *Gomersall* and *Gandell*, so that though they had the legal dominion by the indorsement, yet may not the assignees of *Bentley* say, as you are trustees for *Gomersall* and *Gandell*, and as between them and *Bentley* there was no consideration, the question is, whether you, the petitioners, being trustees for *Gomersall* and *Gandell*, and they being unable to enforce the note against *Bentley* and Co., can you, the petitioners, the trustees, enforce that which your *cestuique trusts* cannot enforce?] The bankrupts are sureties for *Gomersall* and *Gandell*. [Mr. J. Russell:—And the petitioners have released *Gomersall* and *Gandell*, and therefore have released *Bentley* and Co. THE CHIEF JUDGE:—As the bankrupts are sureties for *Gomersall* and *Gandell*, may they not insist on the petitioner proceeding against *Gomersall* and *Gandell* in the first instance?] The comparative amounts of the note and debt decide that; the balance due exceeds the nominal amount of the securities. The note is payable to *Gomersall* and *Gandell*, and indorsed by them to the petitioners. The right to recover thereon

1835.

—  
*Ex parte*  
VERE.

In the matter  
of  
BENTLEY.



1835.

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*Ex parte*  
VERE.In the matter  
of  
BENTLEY.

at law is clear, the only question would be, for whom the petitioners held the proceeds? The state of the account decides that question in favor of the petitioners; for as the petitioners received the bills without notice of the state of affairs between *Bentley* and Co. and *Gomersall* and *Gandell*, *Bentley* and Co. would have no right to an account as against the petitioners. If the petitioners had been the agents for the bankrupts, they could not have recovered in trover, *De La Chaumette v. Bank of England*, 9 *Barn. & Cres.* 208. But here the party claims not as agent, but under their own title. If, therefore, fraud had been proved as between *Bentley* and *Gomersall* and *Gandell*, yet if none existed as between *Bentley* and the petitioners, and the notes passed in the usual course of trade, the petitioners may prove. *Carstairs v. Rolleston*, 5 *Taunt.* 551, decided that a release from the holder to the first indorsee does not prevent the holder recovering against the indorser. [Sir G. Rose:—The notes were not given for a debt, but as security for a debt, and limited to 20,000*l.*; thus the bankrupts are sureties. THE CHIEF JUDGE:—If *Gomersall* and *Gandell* had not failed, they might next morning have had that bill out for the day.] *Ex parte Bloxham*, 8 *Ves.* 531, shows the petitioners may prove, and the whole of the question would be as to the dividends.

Sir J. Cross:—The bills were to be taken out in the morning for the usual purposes, but if those purposes could not be accomplished, might not the depositor keep them?

Mr. J. Russell and Mr. Hoggins, *contra*:—*Gomersall* and *Gandell* by the indorsements pass all their rights to the petitioners, but those rights only. The mere fact of parting with a note to a person to whom a debt is



owing does not make him a holder for a valuable consideration. *De La Chaumette v. The Bank*, 9 *Barn. & Cres.* 208. There must be some subsequent dealing, some omitting to sue or press, in order to create a consideration; otherwise the mere deposit is not enough to entitle the depositor to consider himself a holder for a valuable consideration. [Sir J. Cross:—Is there not a contract for forbearance as to the former debt?] The contract would not give the petitioners a lien, except to the amount of the claim. *Gill v. Cubitt*, 3 *Barn. & Cres.* 466, and that class of cases, shows that the bankers, not knowing of the transaction till the moment of bankruptcy, could not make their claim; they were mere trustees, and as against *Bentley* and Co. must stand as *Gomersall* and *Gandell* stood. A letter of licence has been given. The petitioners say it is recalled; but that makes no difference; if once given the bankrupts are discharged. *Ex parte Smith*, 3 *Brown*, 1. In *Strange v. Wigney*, 6 *Bing.* 677, a banker who discounted a stolen bill was held liable to refund the amount to the real owner.

1835.

—  
*Ex parte*  
VERK.  
In the matter  
of  
BENTLEY.

Mr. Swanston in reply:—The authorities cited do not apply. Did *Gomersall* and *Gandell* obtain the notes by fraud? If so, a foundation would be laid for ulterior inquiry whether the petitioners had notice. But the allegation of fraud has not been established. The consideration is immaterial, for if the petitioner had an antecedent debt, that could give the holders a title, though they could give no consideration. [Sir J. Cross:—A somewhat similar point arose in *ex parte Ellis*. (a) Sir G. Rose:—The point raised in this Court in *ex parte Ellis* (a) was lost sight of on appeal. The point there

*Ex parte Ellis*  
commented on.

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(a) *Mont. & Bl.* 249. Reversed on appeal, *ex parte Robinson*, 1 *Mont. & Ayr.* 18.



1835.  
 ———  
*Ex parte*  
 VERE.  
 In the matter  
 of  
 BENTLEY.

was out of which estate, joint or separate, the bill was to be paid. As to the common law question of proof there could be no doubt, and that was all the Lord Chancellor decided upon.] If we are to be confined to the memorandum, we can marshal the memorandum, and apply this bill to it, and as to the other securities stand on our common law lien. As to being trustees, all persons holding securities are so to a certain extent; but when do they become trustees? When their debt is paid. It never yet was held that a deposittee was a trustee for a defaulting creditor.

THE CHIEF JUDGE:—

If this note had been delivered to the petitioners in the ordinary course of business, to be discounted, or in payment of a debt, &c., the state of circumstances as between *Bentley* and Co. and *Gomersall* and Co. might be immaterial. But such is not the case. It was delivered in fulfilment of a peculiar arrangement. It is said that all the bills deposited on the evening of the 20th of September were deposited as security for the balance, for which the petitioners might sue at law, and therefore may prove in bankruptcy the amount of 19,000*l.* worth of bills, deposited as collateral security for the debt then due; and that want of consideration or fraud, as between *Gomersall* and Co. and *Bentley* and Co., is not to affect the petitioners; and that the existing state of facts did not enable the bankrupt to insist on the other securities being applied in the first instance, as there was a debt for 35,000*l.* But that is not the true way of considering the question. The bills were merely a pledge till next morning, and were not to be indorsed or cashed; the right of the petitioners would therefore depend on circumstances. The state of the law as to the amount, and the consideration as between *Bentley* and Co. and



*Gomersall* and Co., appears from *ex parte Bloxham*, 8 Ves. 531. If there had been a good consideration between *Bentley* and Co. and *Gomersall* and Co. the petitioner might prove, but not if the bills were accommodation bills merely. The petitioner might prove against the bankrupt for the full amount, but would only be entitled to dividends on the amount of the real consideration between *Bentley* and Co. and *Gomersall* and Co. Then it was argued that the petitioners could avail themselves of the security of the bill, as it was deposited as a general security for the balance of 35,000*l.*; but as it was not given in payment or discounted, it would depend on the rights of *Gomersall* and Co. what passed to the petitioners. It has been said that the note was given fraudulently; but the evidence of *Gandell* shows that *Gomersall* and *Gandell* knew nothing of that fraud. It might well have been supposed to have been made in pursuance of an arrangement made when all the parties were present, so that *Gomersall* and Co. might well suppose that *Bentley* had the authority or approbation of his partners. Nevertheless, *Gomersall* and Co. gave a small consideration only, and could not have recovered the full amount of the notes from *Bentley* and Co.; for at the time *Gomersall* and Co. had securities of *Bentley*, and the subsequent advances from *Gomersall* and Co. to *Bentley* were on the faith of other bills. If the whole of the advances had been on the faith of the two notes for 10,000*l.* each, still the only claim would be 1,600*l.* advanced thereon. Even if the deposit were general, yet, according to the authorities, the petitioners would have no higher right than *Gomersall* and Co.

If the whole question depended on a simple deposit, the petitioners would have no higher right or claim than *Gomersall* and Co. But there is a further circumstance;

1835.

—  
*Ex parte*  
VERE.  
In the matter  
of  
BENTLEY.



1835.

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*Ex parte*  
 VERE.

 In the matter  
 of  
 BENTLEY.

the deposit was in pursuance of the agreement or contract, under which the bills each evening deposited, were collective security for 20,000*l.*, in conjunction with the other notes of 10,000*l.* left as a permanent security. On the evening of the 20th of September bills to the amount of 20,000*l.* would be deposited by agreement as security for 20,000*l.* If so, *Bentley* and Co. have a right to say, that till all the other securities are sold, the petitioners have no right to recover, as *Gomersall* and Co. would have no right unless a balance in favor of the whole account would be shown; which is not shown. It is not proved that any of the 20,000*l.* would remain due if the value of all the other securities were first applied in reduction of that sum, or that any equitable claim existed on the other notes. It therefore appears to me, at present, that the petitioners have made out no case to entitle them to prove against *Bentley* and Co. But I wish time to consider before the order is finally made. If I change my opinion the matter will be mentioned again.

Sir *John Cross* : — As the Chief Judge wishes time to consider I shall at present say nothing.

Sir *George Rose* : — If I were satisfied that the petitioners were the *bond fide* holders for valuable consideration, I am of opinion they might prove without regard to the state of circumstances as between *Bentley* and Co. and *Gomersall* and Co. No fraud would prevent a promissory note passing, if intended to pass, to third parties; and as to consideration, the antecedent debt would be enough. But it is impossible to say that as between *Gomersall* and Co. and the petitioners the notes passed *qua* payment, or were left otherwise than as under the agreement, and might have been reclaimed next day. If the petitioners had carried the note into *rem solutam*, and had



balanced off the amount from the account, perhaps that might have given a right to proof; but as that was never done, the bankruptcy on the 20th of September governs the right of the parties as they then existed. Consideration can only be raised by reverting to the agreement. If we do so it will raise a consideration, but it is to be dealt with strictly within its terms. As to drawers and acceptors of bills, at law privity is never considered; but it is different in bankruptcy, where the assets are equitably distributed; so that, though a party might clearly recover at law on a bill, yet in bankruptcy many circumstances may prevent his proving. The equity under bankruptcy relieves the party from the strictness of the contract, and looks at the assets and the other creditors, and gives the bankrupt's estate the benefit of any *quasi* suretyship which may exist. This is in bankruptcy a case of suretyship. If so, what value was received by the maker of this note? The petitioners have no claim but under the agreement, and the bankrupts may hold them to the strict terms thereof, and claim the benefit of every incident of suretyship.

1835.

—  
*Ex parte*  
VERE.  
In the matter  
of  
BENTLEY.

This day, after some further argument, and tender of a new affidavit which was rejected, the judgment of the Court was delivered by the Chief Judge:—

March 13.

If the topics which have been urged to-day by the Counsel on either side had been overlooked by the Court in forming its opinion, or if the argument now pressed upon us had laid any just ground for further deliberation, the Court would willingly have given the case further consideration; but, as all the points now suggested have been already fully considered, it will be unnecessary further to delay the judgment of the Court. The question arises upon a proof tendered by *Vere* and Co. under a fiat against *Bentley* and Co., upon a promissory note



1835.

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*Ex parte*  
VERE.In the matter  
of  
BENTLEY.

made by *Bentley* in the name of his firm for 10,000*l.*, payable to *Gomersall* and *Gandell*, and by them specially indorsed to *Vere* and Co. The proof was rejected by the commissioner, upon the ground, as it should seem, that the note had been obtained by *Gomersall* by fraud, and had been received by the holders without due caution. Upon this *Vere* and Co. petitioned this Court that their proof might be admitted; and their application has been resisted by the assignees on three grounds:—

*First*, On the ground of fraud: *Secondly*, That at least the note was given by *Bentley* and Co. without consideration, and that, having been deposited with the petitioners as collateral security for a pre-existing debt, the holder could have no better title than the indorser; and that, as *Gomersall* and *Gandell* could not have proved against *Bentley* and Co.'s estate, so neither could the petitioners: And *Thirdly*, That the bankrupts were in substance and in equity only sureties for *Gomersall* and *Gandell*; and that the petitioners had given time to *Gomersall* and Co., and had thereby discharged *Bentley* and Co.

We are all of opinion that the first objection is not made out in fact. When the case was before the commissioner, it appeared that *Bentley* had drawn the note in question, with another for a like sum, in the name of his firm, on the 18th of September last, in *Gomersall's* presence; and that, a few days before, *Bentley's* partners had disclosed to *Gomersall* their suspicions that *Bentley* had been guilty of fraudulent practices in circulating the paper of the firm, and intimated their intention of withdrawing from *Bentley* the management of their pecuniary affairs, which had till then been principally entrusted to him; and there was no direct evidence before the commissioner to show for what purpose the notes had been given, except that *Gomersall* stated that they were drawn



in pursuance of an arrangement made between his partner *Gandell* and *Bentley's* partners; but *Gandell* was not examined before the commissioner to explain what this arrangement was. By an affidavit, however, made in this Court, an explanation is given by *Gandell* upon that head, to the effect that it had been agreed between himself and *Bentley's* partners that they should give their notes as a security for monies to be advanced by them to *Bentley* and Co. as occasion might require; and it appears that the sum of 1,660*l.* was actually advanced thereon. But it is said that *Gandell's* affidavit was filed so late that the assignees had no opportunity of answering it, which they could have done by a direct contradiction; and it is to-day for the first time asked that the case may again stand over to afford the assignees the opportunity of so doing. It might be a sufficient answer to this application, to say that it should have been made at an earlier stage of the proceedings. But we are of opinion that, independently of *Gandell's* affidavit, there is not sufficient evidence of any fraudulent collusion between *Gomersall* and *Bentley*; and that, if there had been, as there is no evidence of any knowledge of such fraud, or of any want of due caution on the part of *Vere* and Co., the objection as against them must fail; and the cases of *Gill v. Cubitt*, 3 *Barn. & Cres.* 466; *Strange v. Wigney*, 6 *Bing.* 677; *De La Chaumette v. The Bank*, 9 *Barn. & Cres.* 208, and the other cases cited on the argument, do not apply. And though it is true that a partial consideration only was given by *Gomersall* and *Gandell*, and that for the residue, *Bentley* and Co. may be considered in this Court as mere sureties, yet we are of opinion that that circumstance, and the fact that the note was transferred to *Vere* and Co. as a security for a pre-existing debt, present no valid objection to their proving it under *Bentley's* bankruptcy. For this the cases of *ex parte Crosley*,

1835.

—  
*Ex parte*  
*VERE.*

In the matter  
of  
*BENTLEY.*



1835.  
 ———  
*Ex parte*  
 VERE.  
 In the matter  
 of  
 BENTLEY.

*Cook's B. L.* 157, *ex parte Bloxham*, 6 *Vez.* 449, would be sufficient authorities, if authority were wanting, which are in no degree affected by the dictum of Lord *Tenterden* in *De La Chaumette v. The Bank*, 9 *Barn. & Cres.* 208, which was pressed upon us at the argument, for that observation was founded upon the conclusion that the plaintiff in that case held the note merely as the agent for the party from whom he received it.

It was next said that *Vere* and Co. had given time to *Gomersall* and Co., and had thereby discharged *Bentley* and Co. But even if we consider *Bentley* and Co. in the light of mere sureties for *Gomersall* and Co., and assume that *Vere* and Co. gave *Gomersall* and Co. time, which was but indistinctly proved, this, in the absence of all evidence that *Vere* and Co. knew that the note was given without consideration, would afford no answer to their claim; for it was decided in the case of *Carstairs v. Rolleston*, 5 *Taunt.* 551, that even a release of the payee of an accommodation note, when the holder was ignorant of the fact that it was an accommodation note, was no discharge of the maker. All the objections, therefore, raised by the assignees to the proof claimed by the petitioners have been, we think, satisfactorily answered; but it occurred to the acute and experienced mind of Sir *George Rose*, that, as *Gomersall* and Co. had deposited with *Vere* and Co. other securities to the amount of 22,666*l.* as a collateral security for the same debt in respect of which the 10,000*l.* note was deposited, the assignees of *Bentley* and Co. had, as representing the creditor of a surety, an equitable right to have those securities applied to the liquidation of that debt, and to insist that the estate of *Bentley* and Co. should be made responsible only for the unpaid balance; and we are all of opinion that in the result the bankrupt's estate can only be called upon to make good any deficiency that may remain after



realizing those securities; but we are also of opinion that the bankrupt's estate is liable to the full amount of such deficiency not exceeding 10,000*l.*, and that *Vere* and Co. are therefore entitled to prove to the full amount of the note, but to receive dividends only until from the dividends and the proceeds of such securities they shall have received 20*s.* in the pound upon the debt for which the securities in question were given.

That this is the true and the only limit of the petitioner's right is clearly established by the cases collected in Mr. *Cooke's Bankrupt Law*, page 176, the result of which he sums up thus: — “ If a bill of exchange or promissory note is drawn by way of accommodation, yet the party holding it for a valuable consideration, though less than the amount, is entitled to prove against all the parties but those from whom he received it, to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than 20*s.* in the pound on the consideration that he gave.” It is true that in the case of *ex parte Bloxham* in the matter of *Purdy*, 5 *Vez.* 448, Lord *Rosslyn* held, that as the creditor could only recover against an accommodation acceptor at law damages to the amount of the debt due to the holder from the indorser, so he could only prove to the same amount in bankruptcy; but the same question having been raised by the same petitioners in another bankruptcy before Lord *Eldon*, as reported in 6 *Vez.* 449, Lord *Eldon* recognised the doctrine established by the earlier cases, and held that the holder was entitled to prove for the full amount of the note, and to receive dividends till the debt was fully paid; saying, “ If the petitioners can only prove the amount of their debt they have not the full benefit of the security;” and afterwards, upon a rehearing of the former petition in the matter of *Purdy*, Lord *Eldon* ordered the proof to be admitted to the full amount

1835.

*Ex parte*  
*VERE.*

In the matter  
of  
*BENTLEY.*



1835.

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*Ex parte*  
VERE.In the matter  
of  
BENTLEY.

of the bill, although in that case, as in this, the creditor also held the acceptances of other parties as security for the same debt, but he limited his right to the dividend upon that proof to such sums as would, together with the proceeds of the other securities, pay 20s. in the pound on the debt for which such securities were given.

With a view, therefore, to the dividends, though not to the proof, it becomes material to ascertain the amount of the debt to which the securities in question are applicable. On the part of the petitioners it was contended that they were entitled to apply them to the liquidation of the whole balance due to them at the time of *Bentley and Co.*'s bankruptcy, and that, as the debt would exceed the aggregate amount of all the securities, they were not only entitled to prove, but to receive dividends to the full amount of the 10,000*l.*, independently of all reference to the value of the other securities. First, they insisted that the securities were expressly deposited as a collateral security for the whole balance of 35,000*l.*; and, secondly, that if not expressly deposited for that purpose, yet that, being in their hands as bankers, they were entitled in right of their general lien to apply them to their general balance.

At the time of the argument I was inclined to think that the deposit made on the 20th of September could only be taken as made under the written agreement, and that all the securities must be taken as placed in the hands of *Vere and Co.* to secure the repayment of the original loan of 20,000*l.* and interest; but, upon looking more carefully into the depositions, I think it is plain, that though the permanent deposit of the securities for 10,000*l.* was made for the original loan only, yet that the note in question, and the other contents of the bill case left on the 20th of September, were deposited as security for the second loan of 3,000*l.* as well as for the



original loan of 20,000*l.*; thus making the amount of the debt secured by the deposit larger than the amount of the securities, exclusive of *Gomersall* and Co.'s, and the note in question; and I am now satisfied that there is nothing to prevent our giving full effect to the contract of the parties in respect of that deposit, though made to secure a pre-existing debt. But it is perfectly clear from the evidence, that neither the depositors nor the depositaries considered the securities as pledged for any larger amount; on the contrary, they all admit, in their examinations before the commissioners, that the contents of the bill case were expressly left as a security for the 23,000*l.*

This brings us, then, to this question, whether the bankers have, in respect of their general lien, a right to apply the proceeds of these securities to the further balance said to be due to them in respect of discount transactions wholly distinct from the loans which the securities were intended to secure. As a general proposition, it is true that a banker has a lien for the general balance of his account on all securities in his hands, whether expressly deposited for that purpose or not. But upon what ground does this lien rest? Not upon any inflexible principle of the common law, but upon an implied contract arising out of the general course of dealing amongst bankers, in which every customer is presumed to have acquiesced, unless the contrary appears. But no such inference can be drawn when an express contract inconsistent with that inference is proved; and in this case the debtor having expressly deposited these securities as a security for a specific portion only of a general balance then due, all inference that it was intended as a security for the whole of the general balance is excluded. And this view of the case

1835.

*Ex parte*  
VERE.

In the matter  
of  
BENTLEY.



1835. is supported by the decision in *Vanderzee v. Willis*,  
3 B. C. C. 21.

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*Ex parte*  
VERE.  
In the matter  
of  
BENTLEY.

If, then, the petitioners have no lien on the securities for any sum beyond the 23,000*l.* and interest, a court of equity would compel them to apply the proceeds of those securities to the liquidation of that debt, and would restrain them from recovering against the surety more than the balance left unsatisfied.

When, therefore, this Court is called upon, in the administration of the surety's estate, to order the petitioner's proof to be admitted, it is bound to protect the interests of the other creditors, by restraining the payments in respect of that proof, so as to work out for them all the equities which the surety, if solvent, might have enforced by suit. And this may be done by directing the proof to be admitted for the whole 10,000*l.*, and by declaring that the note in question, and the other securities in the petition mentioned, were held by *Vere* and Co. as collateral securities for the two loans of 20,000*l.* and 3,000*l.*, with interest; that the proceeds of the other securities should be deducted from that debt; and that *Vere* and Co. are entitled to receive dividends on their proof until they should have received full payment of the unsatisfied balance.

C. of R.  
March 6,  
1835.

*Ex parte* OSBORN. — In the matter of GUNNING.

Upon the loss  
by the petition-  
ing creditor of  
his evidence to  
support the fiat,  
the Court of

MR. SWANSTON: — In this case a fiat was issued on a bill of exchange, which has been lost under such circumstances that secondary evidence of its existence cannot be produced. The consequence is, that the fiat

Review will not, on a petition by another person for another fiat, order him to be exempt from paying the 10*l.* under section 45, and the 20*l.* under section 47. — *Quære*, Whether the Court of Review have jurisdiction?



cannot be supported. This is a petition by another petitioning creditor for a new fiat, praying that the 10*l.* paid under 1 & 2 W. 4, c. 56, s. 45 (*a*), and the 20*l.* paid under section 47 (*b*), may not be paid over again, but that the new petitioning creditor may avail himself of those sums which have already been paid. [THE CHIEF JUDGE :— Those sums are paid into the name of the Accountant General, and under the jurisdiction of the Lord Chancellor, 1 & 2 W. 4, c. 56, s. 45.] If the parties refused to pay the sums, the application to

1835.

—  
*Ex parte*  
OSBORN.  
In the matter  
of  
GUNNING.

(*a*) " That there shall be paid to the Lord Chancellor's secretary of bankrupts, upon the granting of every fiat in lieu of a commission of bankrupt by virtue of this act, the sum of ten pounds; and the sums to be so received by the said secretary shall be by him paid, once a week or oftener, as the Lord Chancellor shall think fit to direct, into the Bank of England, to the credit of the Accountant General of the High Court of Chancery, to a separate account, to be entitled " The secretary of bankrupts account;" and all monies to be paid into the said account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies, for the purposes herein-after provided, as the Lord Chancellor shall from time to time think fit to prescribe." 1 & 2 W. 4, c. 56, s. 45.

(*b*) " That in all cases of commissions of bankrupt which, by

virtue of the provisions herein contained, shall be removed into the said Court of Bankruptcy, and under which the choice of assignees shall have taken place prior to the commencement of this act, there shall be paid by the assignees of every such bankrupt's estate, in lieu of all other sums directed to be paid under and by virtue of this act, the sum of three pounds on every sitting under such bankruptcy which shall be held in the said Court, or by any division judge or commissioner thereof, such sum to be paid to the said Accountant General, and to be carried to the said account entitled " The secretary of bankrupts account:" Provided always, that no fee whatever shall be paid on any meeting for the purpose of auditing the assignees accounts, unless there shall appear to the commissioners to be sufficient assets of the bankrupt's estate for the payment thereof."

1 & 2 W. 4, c. 56, s. 47.



1835.

*Ex parte*  
OSBORN.In the matter  
of  
GUNNING.

enforce payment would be to this Court. Besides, this Court can make the usual order, "if the Lord Chancellor think fit." Moreover, the order of the Lord Chancellor is to be as to the disposal of the fund. The party here does not seek to touch the fund, but to be excused from adding fresh sums thereto.

*Per Curiam* : — The petitioning creditor loses a bill which was his evidence in support of the fiat. He might have made it part of the records by filing it with the proceedings. But it is not very intelligible what the nature of the loss can be which prevents production of secondary evidence. There is probably some other reason of which the Court is kept in ignorance. If the Court have jurisdiction, this is not a case for interference ; there is no connexion between the present applicant and the former petitioning creditor.

Application refused.

C. of R.  
March 6,  
1835.

The Court will refer it to the commissioner to enquire whether an arrangement between the assignees and creditors is beneficial.

*Ex parte* KIRBY.—In the matter of POTTINGER.

THE petition stated, that *West* leased to *Pottinger*, on the 28th of August 1822, a piece of ground for seventy-seven years, on a building lease ; that *Pottinger* built two houses thereon ; that on the 4th of August 1823 *Pottinger* assigned to *M. and J. Barber* the lease and houses and other premises, on trust for the benefit of his wife and children ; that on the 26th of October 1825 *Pottinger* underleased one of the two houses to *Critchell* for 74 years, to which *M. and J. Barber* are not parties ; that the assignees had seized all the premises except that leased to *Critchell* ; that such seizure gave rise to much controversy, and to prevent the continuance thereof



and to avoid great litigation and expense, it was proposed that the trustees should retain part of the premises, and the assignees the rest; that an advertisement was inserted in the Gazette, requesting the creditors to meet the assignees, to assent to or dissent from their releasing the part of the premises to the trustees, on condition that the trustees should deliver and release to the assignees the rest; that a meeting was held, and it was agreed by the major part in value there present, being of one third value of all who had proved, that the same should be done; and that it would be for the interest of the estate that such resolution should be carried into effect. The petition prayed that the assignees might carry the resolution into effect, or for a reference to the commissioner whether it would be beneficial.

*Mr. Montagu* for the petition.

Ordered to be referred to the commissioner, to report whether the proposed arrangement would be beneficial to the estate.

*Ex parte* GROOM. — In the matter of CHAMBERS.

**MR. WHITE** was summoned before the commissioner as a witness to be examined under 6 Geo. 4, c. 16, s. 33, and was required to produce a letter which he had received from the bankrupt's wife, and which was supposed to contain evidence, or reference to evidence, of an act of bankruptcy.

The commissioner, having been allowed by the witness to read the letter, decided that the witness was not obliged to produce it, and would not permit him to be

1835.

*Ex parte*  
KIRBY.

In the matter  
of  
POTTINGER.

C. of R.  
March 9,  
1835.

The Court has no jurisdiction to order a commissioner to compel a witness to produce a document which the commissioner thinks he ought not to produce.



1835.

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*Ex parte*  
 GROOM.  
 In the matter  
 of  
 CHAMBERS.

examined as to his remembrance or belief, unless such remembrance or belief were furnished from other sources than the information contained in the letter.

This was a petition against such decision.

Mr. *G. Richards* and Mr. *Arnold*, for the petition, read the 34th section of 6 Geo. 4, c. 16. If the letter had been produced, the assignees, without using it as evidence, might thereby have obtained "information" relating to the bankrupt's dealings, &c. or it might furnish them with the means of procuring evidence. [Sir *George Rose* : — I do not see that we have jurisdiction. Suppose the witness refuses, perhaps the commissioner would not commit him.] No difficulty as to the jurisdiction was felt in *ex parte Cousins*, *Buck*, 531, or in *ex parte Solarte*, *Mont.* 495. In *ex parte Vogel*, 2 *Barn. & Adol.* 219, conversations were divulged; here production of a letter is required; what difference is there whether the matter be parole or written? The commissioner appears to have thought that the rules of law as to evidence applied in bankruptcy: such is not the case.

Mr. *White* appeared in person, and stated he would not volunteer to produce the letter, but placed himself in the hands of the Court, and should not resist any order they might make. He had no personal objection to the production of the letter.

THE CHIEF JUDGE : — The commissioner appears to have considered this as a question of evidence; if it were so, he was right in not allowing the letter to be read. If it had been produced as evidence of an act of bankruptcy, or of dealing or trading, it would be inadmissible as evidence, because it referred to matters concerning



which the wife could give evidence *viva voce*; and a letter was not the best evidence; and if the rules of evidence prevented her being examined *viva voce*, then her letter could not be read. If the wife could not be examined, no declaration of her's could be received as evidence, unless she were then acting as the agent for her husband; therefore, without such proof in this case, she could not be examined, or her letter produced. But the petitioners declare there may be something in the letter which may give them a clue to a fact of which they may then procure evidence elsewhere. It appears to me that they may use the 6 Geo. 4. c. 15. s. 33. for such purposes, and that this letter may enable the assignees to produce or corroborate some proof that the wife had admitted an act of bankruptcy as agent for her husband. If, therefore, *White* can give any "information" which would be corroborated by the production of the letter, I think he should produce it. At the same time, this is a question entirely for the discretion of the commissioner.

*Sir John Cross* : — The only object of the parties is the perusal of the letter now in Court, and the Court may order *White* to allow it to be produced; so that the parties need not go again before the commissioner. This is not a question of evidence, which in a strict sense only arises in a court in which an action or suit is carrying on: the strict rules of evidence do not attach to private legal inquiries.

*Sir George Rose* : — All we could do would be to intimate to the commissioner that he should order the production of the letter, and, if I were a commissioner, I should follow that intimation; but we have no jurisdiction to make a direct order. The Court cannot compel a com-

1835.

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*Ex parte*  
GROOM.  
In the matter  
of  
CHAMBERS.



1835.

*Ex parte*  
GROOM.In the matter  
of  
CHAMBERS.

mission to pursue a particular line of examination. There is no question here as to the evidence of the wife; she must answer as to trading, though not as to the act of bankruptcy. Suppose the assignees brought an action against *White*, and filed a bill of discovery of the contents of the letter, could he defend himself on the ground that it was the wife's letter? I apprehend not. An examination before the commissioners is a *vind voce* bill of discovery; the assignees cannot use the letter as evidence, but only as a means of procuring information or evidence.

The Court here asked *White* if he would place the letter in the hands of the Court, to be dealt with as was expedient? He said he would not volunteer, but would not resist. He then put in the letter. The Court thereon handed the letter over to the assignees.

C. of R.  
Mar. 9 & 11,  
1835.

The Court has jurisdiction to enforce a purchase of premises sold under Lord Loughborough's general order.

*Ex parte* SIDEBOTHAM. — In the matter of  
BARRINGTON.

MR. *SWANSTON* and Mr. *Teed* for the petition:— This is a petition for specific performance of a contract for purchase of mortgaged premises, sold, by direction of the commissioners, under Lord *Loughborough's* order. The defence is, a defective title. There were two lots; one was disposed of in *ex parte Sidebotham*, 1 Mont. & Ayr. 665, and this is the other lot: the two cases are on all fours, and the same order will be now made.

Mr. *Bethell* and Mr. *Rogers*, for the purchaser, referred to the argument on the former occasion. The case is very different from the former. It is alleged that



the sale was under the order of the Court; if so, it was unknown to the purchaser, the particulars of sale being altogether silent as to any order of any Court; they do not even state that the premises formed part of a bankrupt's estate. Now to give this Court jurisdiction, the purchaser must have known that he was buying under the order of this Court. On the former occasion this objection did not apply, the particulars stating that the sale was under the order of this Court.

In *ex parte Gould*, 1 Gl. & J. 231, the purchaser did not appear, and the decision was *ex parte*. In this case the first mortgage was made to *Dykes* in 1822, a second to *Beach* in 1825, and a third was made to *Skirrett* in 1829, subject to the two former: *Dykes* and *Beach* join in this petition; *Skirrett* does not, nor is he served, and the Court cannot act in his absence. Moreover, the assignee of the Insolvent Debtors' Court is not served, and if the equity of redemption were not in *Skirrett*, it would still be in that assignee. All necessary parties must be ordered to join in the conveyance, but *Skirrett* is not before the Court, and there is no jurisdiction to proceed in his absence; the other side have acted under his deed. But even granting it to be fraudulent, it has not yet been declared so, and set aside, and can the Court do so, in effect, in the absence of *Skirrett*? In *ex parte Jackson*, 5 Ves. 357, it was decided that the Court had no jurisdiction over a second mortgagee, not claiming under the commission, to order him to join in making a title. The order therefore, if made, will be a nullity.

Another question is, How far the order of the commissioners for sale is the order of this Court? Lord *Loughborough's* order is merely a rule for the administration of assets, to allow a proof, and to take an account. Before that order, premises might have been sold if the assignees and mortgagee concurred. Does a sale under

1835.

*Ex parte*  
SIDEBOTHAM.  
In the matter  
of  
BARRINGTON.



1835.

*Ex parte*  
SIDEBOTHAM.  
In the matter  
of  
BARRINGTON.

the general order of Lord *Loughborough* come under the principle enabling Courts to enforce sales made by order of Court? The sale is not by order of Court, but of the commissioners, and is not binding on litigant parties. The assignees and the mortgagee are the parties actually selling, and Lord *Loughborough's* order is as a warrant to the assignees to sell, to the commissioners to take an account for the security, and allow proof for any deficiency. The test of whether the sale is by order of the Court is, whether it be within the statute of frauds. A sale under the general order cannot be enforced without a contract. *Jellis v. Mountford*, 4 *Barn. & Ald.* 246, was decided under 53 Geo. 3. There is no similar decision since the 6 Geo. 4. c. 16. came into operation. From the objection to the commission the title is doubtful, and a party cannot be compelled to take a doubtful title. [Sir *G. Rose*:—This Court cannot hear any objections to the validity of a commission or fiat, without a petition to supersede. As to title, he might perhaps insist upon an inquiry, but the objections made would not prevent such inquiry being ordered.] The respondent never waived the objections to title; he took possession subject thereto. A bill has been filed in equity to enforce specific performance of another contract of sale under this bankruptcy, and the Vice-Chancellor refused to order the money into Court. The alleged waiver of the objections to title is a lease granted in November 1833. The petition alleges that the respondent put the tenant into possession; the respondent denies this, and states that the mortgagee put the tenant into possession, and received the rents. In *ex parte Barrington*, 1 *Mont. & Ayr.* 655, the question was the time of granting the lease, and the respondent could not then prove that the discussion of the title was continued lower down than October, the lease being in.



November. It is now proved that the joint opinion of Mr. Serjeant *Scriven* and Mr. *Teed* was given in December. The parties were waiting for the opinion of counsel, to be given on a similar question arising on the sale of other parts of the premises, and which opinion it was agreed should be binding in this case.

1835.

*Ex parte*  
SIDEBOTHAM.  
In the matter  
of  
BARRINGTON.

THE CHIEF JUDGE:—

The sale in fact was made under the order of the Court. The premises were sold under the same order and at the same place and time as the other premises, which were expressly stated in the particulars of sale to have been sold under the order of the commissioners, so that, for the purpose of founding our jurisdiction, the sale was under the order of the Court.

The other objections are, that the assignees cannot make any title, and that consequently the Court will not interfere. The objections to the title are, 1st, That the commission is invalid; 2d, That the equity of redemption is vested in *Skirrett*, or the assignee of the Insolvent Court. These objections were well known to the respondent from the beginning, he being the son of the bankrupt. It is not, however, proved that the commission is invalid, for the fact that the petitioning creditor's debt was inserted in the schedule presented to the Insolvent Debtors' Court is no objection, it having already been decided that so doing does not extinguish the debt. (a) No doubt that, in a proper case, a fiat might be superseded on the ground of the existence of a prior insolvency, and that the estate was vested in the assignee of the Insolvent Debtors' Court; but there is no right in any party to have this done. The circumstances under which this conveyance are to be made render it probable

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(a) *Jellis v. Mountford*, 4 Barn. & Adol. 246.



1835.

*Ex parte*  
 SIDEBOTHAM.  
 In the matter  
 of  
 BARRINGTON.

that the commissioners of the Insolvent Debtors' Court would order the assignee under the insolvency to join, as the 11 G. 4. and 1 W. 4. c. 38. s. 5. enacts, "that if any interest be vested in the provisional assignee which appears of no value to the creditors, but nevertheless it may be expedient that the provisional assignee should join in some conveyance thereof, then the commissioners of the Insolvent Court may order him to join in any conveyance thereof," &c.

The question is, Whether the purchaser have waived the objections? It is said that this case differs from the last (a), as the title was under discussion, and an opinion was given after the lease was granted; but on production of that opinion, it appears to relate to a life estate, not the estate in question. Then it was said, that it was intended that the opinion to be given as to the life estate should be decisive as to the present purchase also; and it is sworn that it was well understood that such was to be the case; but there is no proof of any agreement. The lease therefore was intended as a taking possession, and a waiver of objections. It was said that it contained a proviso to be void if no title were made. If a distinct proviso to be void if no title were made had been inserted, it would prevent its having been a waiver, but there is no such proviso. This case is situated as the last was, and the same order must be made.

Sir *John Cross* :—If the purchaser would incur any danger of substantial loss by our declaring him to have waived the objections, we might perhaps hesitate, but both the other mortgages were prior to his title. The objections to the title were not made known to him

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(a) *Ex parte Barrington*, 1 Mont. & Ayr. 655.



through the abstract; he knew them all along; there is nothing to distinguish this case from the last. The purchaser appears to have purposed to obtain the property without paying for it.

1835.

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*Ex parte*  
SIDEBOTHAM.  
In the matter  
of  
BARRINGTON.

*Sir George Rose:—*

The Lord Chancellor sitting in bankruptcy had jurisdiction to enforce specific performance. His authority is transferred to this Court, which is a court of law, equity, and record. The last case (a) was the first contested application in bankruptcy; I then thought we had, and still think we have, jurisdiction.

The former case was somewhat stronger, as the particulars stated the sale to be under order of the commissioners. Was not this? It has been properly put to the Court, whether a sale under Lord *Loughborough's* order were a sale under an order of Court? I think the general order is to be considered as a specific order in each particular case; and it would be most mischievous to hold the contrary.

A general order acts as if a particular order in each case.

If, however, assignees conducted a sale so that a purchaser could not know they were selling under Lord *Loughborough's* order, and was ignorant that he was buying under that order, there might be no ground for the summary interference of this Court, because the party has a right to know under what jurisdiction his purchase is liable to be enforced. The particulars of sale are not drawn so cautiously as they might be; but as even this point is not put in issue by the affidavits, and is merely thrown out by counsel, we consider this purchase is made under the order of the Court, with the knowledge of the purchaser. Every purchaser is entitled to have the title investigated by the Court, before

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(a) *Ex parte Barrington*, 1 Mont. & Ayr. 655.



1835.

*Ex parte*  
 SIDEBOTHAM.  
 In the matter  
 of  
 BARRINGTON.

specific performance is decreed. Taking possession or making a lease are not conclusive evidence of an intent to waive objections to title, but are evidence of such intent. The lease, which was not produced in the former case (*a*), is now produced, and no such proviso is to be found therein as was stated to exist in the former case (*a*): it is a common lease.

The intent with which that lease was executed is so illustrated by the other facts of this case as to render it clear that it was granted after the purchaser was thoroughly acquainted with all the title, and had abandoned all idea of objecting thereto. The case submitted for the opinion of counsel, as to the life estate, contains statements clearly showing that the party knew all objections to title, and intended to waive them. As to any objection to the validity of the commission, the Court would never supersede under the circumstances, the bankrupt being certificated. The estate was mortgaged to *Skirrett* under trusts which have never arisen, therefore the mortgage to him, being of an equitable estate only, is no objection to title. As to parties to the conveyance, no difficulty will arise: as to the bankrupt, the Court can compel him to convey (*b*); as to *Skirrett* and the assignee under the insolvency, if this were a sale in the master's office, and they were merely formal parties, and refused to execute it, would it not be at the risk of paying the costs of an application to the Court to compel them? There is no substantial objection to title, and it appears to me that the repugnance to complete the purchase arises from other reasons than those alleged.

Ordered.

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(*a*) *Ex parte Barrington*, 1 *Mont. & Ayr.* 655.

(*b*) 6 *Geo. 4. c. 16. s. 78. Ex parte Hargrave*, 2 *Gl. & J.* 59.



*Ex parte* THOMAS ROGERS.—In the matter of  
WILLIAM ROGERS.

C. of R.  
Mar. 9 & 14,  
1835.

**GEORGE ROGERS** was the brother of the bankrupt, and issued the fiat on a debt, since reduced by the commissioner below 100%. The petitioner had also accepted an accommodation bill for the bankrupt, which the bankrupt indorsed to *Moger* and *Smith*, who proved under the bankruptcy, and also brought an action against the petitioner as acceptor, who paid the amount to *Moger* and *Smith*.

If the petitioning creditor pay a bill which he accepted for the bankrupt's accommodation, after it has been proved by the holder, he may use the name of the proving creditor as a substitution for his own insufficient debt.

This was a motion by the petitioning creditor, *Thomas Rogers*, that he might be at liberty to present a petition to this Court, in the name of *Moger* and *Smith*, praying for an order that the fiat might be proceeded in; and further praying that the costs, charges, and expenses of and incident to the said petition, and consequent thereon, might be paid out of the estate and effects of the bankrupt, the said *Thomas Rogers* thereby undertaking to indemnify *Moger* and *Smith* against all costs that might ensue in consequence of the presentation of such petition in the names of *Moger* and *Smith*.

Mr. *Swanston* and Mr. *G. L. Russell* for the motion :  
—This is a petition to substitute a new petitioning creditor's debt under 6 Geo. 4. c. 16. ss. 18 and 52. Section 52 enacts, " that any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt, although he may have paid the same after the commission issued, if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or



1835.

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*Ex parte*  
ROGERS.In the matter  
of  
ROGERS.

would be entitled to in respect of such proof." And section 18 enacts, "that if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid."

Mr. *Bethell*, for *Smith* and Co., opposed the motion. *Smith* and Co. object to their names being used.

1st. The petitioner cannot apply on his own behalf, as the 18th section expressly excludes him, the words being "any other creditor." Even without these words he would be excluded, as he paid the money to *Moger* and Co. after the fiat issued, whereas the debt to support a fiat must be an existing debt when the fiat issues; and the 18th section clearly requires that the debt to be substituted should be a *bona fide* legal debt, outstanding at the time of the act of bankruptcy, and one on which the petitioning creditor proposed to be substituted might have brought an action in his own name. The words are "any other creditor;" but *Rogers* was not a creditor on these bills when the fiat issued; even now he is not a creditor on the proceedings. Nor can the applicant support this application under section 52; that clause gives the surety who pays, all rights which the original creditor possessed "in respect of such proof," that is, to receive dividends, assent to or dissent from the certificate, &c. Moreover, a surety who pays becomes merely the equit-



able assignee of the debt, and an equitable debt will not support a fiat.

1835.

*Ex parte*  
ROGERS.  
In the matter  
of  
ROGERS.

2d. The application cannot be supported in the names of *Moger* and *Smith*. Even if the Court give the applicant leave to use their names contrary to their wish, yet, the bills being paid, the debt of *Moger* and *Smith* is absolutely gone and extinct, so that, as *Smith* and Co. could not apply on behalf of themselves, so neither can the applicant make use of their names.

The whole therefore comes to this: *Moger* and *Smith* could not support this application on their own behalf, as they are paid in full; *Rogers* cannot support the application, as he is not “any other creditor.” There fore the motion must be dismissed.

Mr. *Swanston*, in reply: — If the petitioner came to prove under section 52 he must exhibit the bills, therefore they are not utterly gone for all purposes. A petitioner under section 52 is not a mere assignee of a debt, but having paid he becomes a full legal creditor.

THE CHIEF JUDGE: — Nothing said on behalf of the applicant has convinced me that he should succeed, but as one of the judges (a) is of a contrary opinion, I wish to consult with that judge.

Sir *George Rose*: — I think the 52d section never intended to confer the right contended for; that section only puts the surety in the place of the creditor as to proof and its consequences of dividend, &c. Even if *Smith* and Co. consented, yet the moment their debt was paid it was, as to them, extinct; and *Rogers* is not “any

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(a) Sir *John Cross* :



1835.

*Ex parte*  
ROGERS.In the matter  
ofROGERS.  
March 14.

other creditor." The petitioner's claim is money paid and advanced for the bankrupt since the fiat issued.

*Cur. ad. vult.*

The CHIEF JUDGE :— (a)

The debt sought to be substituted arises from the applicant having been compelled to take up bills accepted by him for the accommodation of the bankrupt, and the ground of the application was, that he was a surety for the bankrupt within 6 Geo. 4. c. 16, sect. 52.

Upon consideration, we are of opinion that the applicant comes strictly within the terms of that section. When this case was last before the Court, all the judges felt great difficulty in finding that this was a case contemplated by the legislature in that section, as its object then appeared to us to be, to remedy the inconveniences to which a surety was exposed before the 49 Geo. 3. c. 121, sect. 8. The present act contains words not in the 49 Geo. 3., viz. "all other rights;" (b) these words appeared to me to apply only to rights to vote in the choice of assignees, receiving dividend, and assenting to or dissenting from the certificate, and not to any right under the 18th section of 6 Geo. 4. c. 16. Besides which, that clause excludes the same petitioning creditor from substituting another debt, which is as a punishment to him for taking out a fiat on a debt which would not support it; but that difficulty is not insurmountable if the other

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(a) These judgments are *ex relatione*. . . the dividends upon such proof." The words in 6 Geo. 4. c. 16. sec.

(b) The words in 49 Geo. 3. c. 121. sect. 8. are, "And the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends and all other rights under the said commission." 52. are, "shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission."



difficulty as to the 52d section can be got over. I also felt another objection, namely, that the applicant *Rogers* was not a creditor upon the proceedings, and *Moger* and *Smith*, who were creditors, were not the petitioners, nor consenting to allow their names to be used. But *Smith* and Co. had a right to have substituted their debt before it was paid, and *Rogers*, having paid them, stands in their place as to "dividends and all other rights." The 52d section contains very general words, giving the surety paying the debt all the rights which the original creditor would have possessed. *Moger* and *Smith* do not consent to this application, but they give no reason for refusing. The question then becomes, Whether, notwithstanding their opposition, we can make the order prayed? The Court are of opinion, that *Moger* and *Smith* ought to consent to the petitioner presenting such a petition as may enable the Court to grant the relief sought.

1835.

—  
*Ex parte*  
ROGERS.  
In the matter  
of  
ROGERS.

Sir John Cross : —

*Rogers* being surety for the bankrupt, and having paid the debt, is entitled to stand in the place of *Moger* and *Smith* as to all those rights and privileges which they originally possessed. The debt is transferred to the surety, so that it is perfectly clear that if he had not been petitioning creditor he might have substituted the debt after paying *Moger* and Co. The difficulty arises from "any other creditor," used in the 18th section, and which seems to exclude the right of any person who was not a creditor on a debt when the fiat issued; and a creditor on the proceedings, from coming here to substitute; but he does not come in his own right, but in *auter droit*, in right of *Moger* and *Smith*. Suppose a creditor had died and had made *Rogers* his executor, *Rogers* in character of executor clearly might have come to substitute; and why may he not as surety, coming in the right of *Smith*



1835.

—  
*Ex parte*  
 ROGERS.  
 In the matter  
 of  
 ROGERS.

and Co.? The words of the 18th section, “any other creditor,” being apparently opposed to the right of the applicant to act in his own name, he comes here for leave to use the names of *Moger* and Co., as is usual practice to permit the name of an assignee to be used in an action, on giving him an indemnity.

*Sir George Rose* : —

This is quite a new case. On the former occasion I had some doubts, but on consideration, those doubts resolve themselves into the ground of a contrary opinion to what I then entertained.

It at first struck me that this was not a case contemplated by the act, the party not being “any other creditor,” and because the terms of the act appear to imply that the application must be by a creditor having a debt existing on the proceedings.

As regards the petitioning creditor personally, the Court is not over anxious to relieve a petitioning creditor from the consequences of issuing a fiat on an insufficient debt; but as he stands before the Court now, that would not induce us to refuse assistance, he paying all costs.

It was said, on behalf of *Moger* and Co., that a surety who pays a debt is merely an equitable assignee of the debt, and therefore cannot support a fiat which requires a legal debt. But this, being a court of equity, possesses the means of overcoming that difficulty in point of law; and here a surety, who cannot proceed in his own name, may nevertheless call on the creditor whom he has paid to allow him to use the name of such creditor in any proceedings to recover the debt from the principal; the surety might even say, “Here is the money, and as the only way in which I can recover from my principal is through a fiat, you must strike a docket against my prin-



cipal." If such a case arose, there might be a difficulty as to the affidavit to be made on striking the docket, but perhaps it might be dispensed with.

The moment the bill was paid, the debt as to *Smith* and Co. was, it is true, extinguished, but still it remained in force, as against the bankrupt, for the benefit of the surety who paid it.

All that is now asked is, that *Rogers*, the surety, may be at liberty to speak to the Court in the name of the original creditors, *Moger* and *Smith*.

No substantial objection has been urged against permitting the name of *Moger* and *Smith* to be used for that purpose; and it is very unjust in a creditor, whose debt has been paid by a surety, to throw any obstacles in the way of the surety being repaid.

The applicant has a moral right to what he asks, therefore the equity is in his favour.

It therefore appears to me it will be sufficient to inquire, Whether, at the time of the substitution, there were any kind of debt owing to the surety? and, Whether, at the time of the payment by the surety, there was such a debt in *Moger* and *Smith* as would support a fiat? Both which inquiries, I am of opinion, must be answered in the affirmative.

The order made was as follows:—

This Court doth declare, that the said *Thomas Rogers* is entitled to stand in the place of the said *George Moger* and *John Smith* in respect of the debts due on the bills of exchange, dated the 11th January and 1st November 1833, and proved by them under the said fiat, as to the dividends, and such proof or proofs, and all other rights under the fiat in respect to the said debts respectively, and for that purpose, if necessary, to use the names of the said *George Moger* and *John Smith* in any appli-

1835.

*Ex parte*  
ROGERS.

In the matter  
of  
ROGERS.



1835.

—  
*Ex parte*  
 ROGERS.  
 In the matter  
 of  
 ROGERS.

cation or proceedings to support such fiat, upon giving to the said *George Moger* and *John Smith* a good and sufficient indemnity against all loss, costs, charges, damages, or expenses they may incur, sustain, or be put unto in respect thereof; and the Court doth hereby refer to *Francis Gregg* esq. to settle and approve of the said indemnity between the parties, if they differ about the same. And it is ordered, that the costs of the said *Thomas Rogers*, and of *George Moger* and *John Smith*, of this application and the indemnity, and incidental thereto, be paid by *Thomas Rogers*.

C. of R.  
 March 10.  
 1835.

*Ex parte* BELCHER. — In the matter of  
 MABERLY.

The owner of the freehold gave a mortgage for a term of years, but remained in possession; while in possession he added fixtures. Held, the fixtures were not in his reputed ownership.

THIS petition, which was presented by the assignees, stated that *Maberly*, upon the marriage of his son, mortgaged to the trustees of the settlement for a term of years in certain premises of which he was seized in fee, to secure 15,000*l.* for the purposes of the settlement. The deed contained the following common words: — “And also all and singular houses, outhouses, buildings, barns, stables, yards, backsides, orchards, gardens, ways, waters, watercourses, mines, woods, underwoods, commons, common of pasture and turbary, hedges, fences, lights, liberties, easements, profits, privileges, emoluments, hereditaments, and appertinents whatsoever to the said mansion, messuages, lands, tenements, hereditaments, and premises herein-before granted, released, and confirmed or mentioned, and intended so to be, or any part or parts thereof belonging or in anywise appertaining, to or with the same or any part thereof usually holden, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part,



parcel, or member thereof." *Maberly* continued in possession, and, after the mortgage was executed, added various fixtures to those which were annexed when the mortgage was executed. A few months before the bankruptcy *Maberly* lent the house to the Duke of Richmond to occupy as a furnished house without paying any rent, who continued to occupy it until the bankruptcy. The questions were—1st. Whether tenant's fixtures passed by the conveyance? 2nd. Supposing they passed, whether they were within section 72 as to reputed ownership.

1835.

—  
*Ex parte*  
BELCHER.  
In the matter  
of  
MABERLY.

The mortgagee consented to the jurisdiction.

Mr. *Swanston* and Mr. *Montagu* for the petition:—

The first point is, whether the fixtures were in the reputed ownership of the bankrupt? On this subject the principle is clear, that real chattels do not in general pass as in the reputed ownership, because their possession does not raise a reputation of ownership; but personal chattels do so pass. This is the common principle on which a whole class of decisions as to traders is founded. The possession of real property does not raise such a reputation of property in the possessor as to mislead the public,—*Coombs v. Beaumont*, 5 *Barn. & Adol.* 77, and therefore dealing in real property has been held not to constitute a trading; but if fixed property be of such a nature as to create this reputation, it must fall within the statute. The reason ceasing, the exception ceases. Such is the law with respect to personal property; for when the possession does not create a reputation of ownership, it is not within the statute, as in all the various cases of bankers, factors, trustees, &c., particularly in *Ridout v. Lloyd*, *Mont.* 103, in which case large quantities of tallow were in the docks in the name of the bankrupt, but the transfer tickets were deposited



1835.

—  
*Ex parte*  
 BELCHER.  
 In the matter  
 of  
 MABERLY.

with *Lloyd* and Co. The Court held, that the possession by the bankrupt of the tallow, by its being entered in his name, did not create a reputation of ownership, as the right was transferrable by a transfer of the tickets. So in *Thompson v. Bradbury*, 1 *Bing.*, New Series, 326, a coal merchant hired barges, upon which his name was painted, and they were registered in his name under the waterman's act; but they were held not in his reputed ownership, there being a custom in the trade so to hire and deal with barges. The question on which every case turns is, Does the possession create a reputation of ownership? That the possession of tenants' fixtures creates in general a reputation of ownership in the possessor cannot be denied. There may be exceptions, as in houses at watering places; but, in general, the position cannot be controverted. Upon the very principle, therefore, that fixtures in general do not pass, because they do not create a reputation of ownership, tenants' fixtures do pass, because they do create such reputation. The distinction between tenants and other fixtures has not been made till of late years; but, under the general name of fixtures, all fixtures have been excluded from the operation of the statute. This hasty generalization, this hasty mode of establishing a general practice from a particular case, without regarding the principle, is not peculiar to legal reasoning. We are now to consider whether the rule has not been supposed to be more general than it really is.

The first case is *Russell v. Bishop*, 5 *Russ.* 347, which has been supposed to be contrary. It is nothing but supposition; for, when examined, it will be found to confirm the doctrine that tenants' fixtures are within the statute. The marginal note is, "Machinery affixed to the freehold of iron works is not considered to be within the order and disposition of the bankrupt trader, where,



by the custom of the country when iron works are let, such articles are furnished by and continue to be the property of the lessor;" and that this is correct will appear by referring to the judgment of the Master of the Rolls. In *Place v. Fagg*, 4 Mann & Ry. 277, Mr. Justice Bayley says, "Fixtures which the tenant has a right to remove may be treated as chattels in a proceeding against the tenant, but as against the owner of the estate they are part of the freehold." This appears in favour of the supposition that tenants' fixtures do not pass. Whether it is more than appearance is, to say the least, doubtful.

The next case is *Hubbard v. Bagshaw*, 4 Sim. 326, which was followed by *Trappes v. Harter*, 3 Tyrw. 624, in which, though the decision was on the ground that the fixtures were not intended to pass, yet the dicta of Lord Lyndhurst show his opinion to be, that they would be in the reputed ownership. He says (p. 625), "It also appears that machinery of this description is in that part of the country constantly bought and sold without reference to the freehold as between landlord and tenant; it is clear that such machinery put up by the tenant might be removed by him. The bankrupts were the reputed owners of the machinery, and, in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that, with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor, and not to the heir, and that it was the partnership estate of the bankrupts." And (at page 628), "Now these authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when this can be done without

1835.

—  
*Ex parte*  
BELCHER.  
In the matter  
of  
MABERLY.



1835.

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*Ex parte*  
BELCHER.In the matter  
of  
MABERLY.

injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate."

In *Coombs v. Beaumont*, 5 *Barn. & Adol.* 77, Mr. Justice *Little Dale* thus clearly lays down the principle:—"Property affixed to the freehold is not within the intent of the statute, because the possession of such property does not create a visible ownership in the bankrupt." And Mr. Justice *Parke* says, "This was determined in the case of *Horn v. Baker*, 9 *East*, 215; and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removable between lord and tenant and such as would not."

From this observation of Mr. Justice *Parke*, "as far as my experience goes," it is not too much to infer that he had not examined it with his usual accuracy, but that he acted under the general impression that *Horn v. Baker* extended to all fixtures, although in that case the question of tenants' fixtures was not agitated.

In *Boydell v. M<sup>c</sup>Michel*, 2 *Crompt. & Mees.* 183, S. C. 3 *Tyrrw.* 980, the Court decided, that, according to *Horn v. Baker*, no fixtures are goods and chattels within the meaning of the act; but we repeat that this was never laid down in *Horn v. Baker*.

The next case is *ex parte Austin*, 1 *Dea. & Ch.* 207, where Sir *George Rose* said, "I have no hesitation in saying, that where fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are in the order and disposition of the bankrupt." This was followed by *ex parte Lloyd*, 1 *Mont. & Ayr.* 494, where Sir *George Rose* says, "It has been urged, that where a custom to let machinery exists, that prevents the doctrine of reputed ownership from attaching. Such is not the case, as was decided in *Lingard v. Messiter*, 1 *Barn. & Cres.* 308.



*A. B.* was the owner of machinery which was seized under an execution, and conveyed by a bill of sale to a creditor, who afterwards demised them to *A. B.* at an annual rent. *A. B.* subsequently became a bankrupt. The counsel for the defendant urged, that it was proved that there was a usage to rent such machinery, and cited *Horn v. Baker*, 9 *East*, 215; but it was held that the machinery passed to the assignees, as having been in the reputed ownership of *A. B.* In that case Mr. Justice *Bayley* said, "When once it is proved that the bankrupt has been the owner, and has continued in possession till the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and therefore proof of those facts is *prima facie* evidence that the bankrupt is both reputed and real owner. In this case it was proved that the bankrupt was once the owner of the machinery, and the jury have found that it continued in his possession till the time of the act of bankruptcy. That being so, the reputed ownership must be presumed to have continued so long as the possession continued; and the other judges made observations to the same effect. It is submitted that this case of *Lingard v. Messiter* is so similar in its circumstances to the case now before the Court as to serve as a precedent."

The last case is *ex parte Wilson*, ante, page 61.

Mr. *Richards* and Mr. *Reynolds*, contra, were stopped.

THE CHIEF JUDGE: —

This is a petition by the assignees to have certain property delivered to them, as having been in the reputed ownership of the bankrupt. Assignees are entitled to all the property of the bankrupt, whether real or personal, and to all which, though not actually the

1835.

*Ex parte*  
BELCHER.

In the matter  
of  
MABERLY.

March 10,  
1835.



1885.

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*Ex parte*  
BELCHER.In the matter  
of  
MADERLY.

bankrupt's, was in his reputed ownership. In this case the assignees claim on two grounds. First, that the bankrupt was the true owner, as the fixtures in question were not included in the mortgage; if so, there would be an end of the question, as the bankrupt would be the true owner. And here a distinction was attempted to be drawn between those things which were affixed at the time of the mortgage and those which were subsequently attached by the bankrupt, and it has been urged that the mortgagee has no right to the latter. It is also said, that some portions of the property are not fixtures, strictly speaking, but furniture. If that were so, the assignees would be clearly entitled thereto; but the affidavits show that they were fixtures, not only modelled and fitted into recesses, which would not make them fixtures, but also fixed by nails and plugs, which makes them fixtures. A further distinction was attempted to be made between landlords' fixtures and tenants' fixtures, that is, those attached by the landlord and those attached by the tenant. Those which the tenant cannot remove are, 1st, those affixed by the landlord himself, or some of those affixed by the tenant. Those affixed by the landlord himself cannot be removed by the tenant, and the general rule formerly was the same as to the tenant. That has been relaxed as to some, but not as to all fixtures: he cannot remove if he would thereby materially injure the premises, even though put up for trade purposes. The fixtures in this case, however, are such as, if fixed by a tenant during his term, he might remove during or at the end of the term.

It always was my opinion, that if the owner of the freehold attached any fixture to the freehold, such as a grate, it becomes a permanent fixture, so that on letting the premises the fixtures are let along therewith; and on ordinary occasions like the present there is no distinction



whether the premises be sold, leased, or mortgaged. A mortgage of the premises made by the landlord is a mortgage of the fixtures also. The opinion of Lord *Hardwicke* in *ex parte Quincey*, 1 *Atk.* 477, rested on the peculiar circumstances of the case, especially the intent of the parties; but his opinion does not appear to me to impugn the general rule, that when a landlord parts with the freehold he parts with all attached. It has been argued that the fixtures attached by the mortgagor, while in possession after the mortgage, passed to the assignees, and not to the mortgagee. There is no case, or even dictum, to the effect that where a mortgagor in possession alters the premises by additions, that the addition does not belong to the mortgagee. There is no distinction on that ground. I am therefore of opinion that all the fixtures passed to the mortgagee.

The next question is, whether the fixtures were in the reputed ownership? Part of the premises were let to a tenant, and *Sherly House* was, by permission of the bankrupt, inhabited by the Duke of *Richmond*. That would not prevent reputed ownership attaching, the possession of the tenant being the possession of the landlord. The question therefore is, whether or not these were goods and chattels? Many nice and difficult points arise in disputes between a tenant and a mortgagee, and the cases thereon have occasioned me some difficulty. It appears to have been the opinion of the judges of the common law courts that no fixtures are goods and chattels, of whatever kind they may be, or for whatever purpose affixed, whether for trade purposes or otherwise; *Coombs v. Beaumont*, 5 *Barn. & Adol.* 72, *Boydell v. M'Michel*, 1 *Crompt. Mees.*, and *Roscoe*, 177, especially the last, where the question turned on the right of the assignees to remove stoves, grates, cisterns, &c., attached by the tenant.

1835.

*Ex parte*  
BEICHER.

In the matter  
of  
MABERLY.



1835.

—  
*Ex parte*  
 BELCHER.  
 In the matter  
 of  
 MABERLY.

Justices *Park* and *Alderson* thought these did not pass to the assignees by the assignment. There are, however, cases against the rule thus broadly laid down, which cases have occurred in bankruptcy, such as *Rufford v. Bishop*, 5 *Russ.* 346; for I think that the judge who decided that case would not have agreed in the rule so laid down in the two cases of *Coombs v. Beaumont*, 5 *Barn. & Adol.* 72, and *Boydell v. M<sup>c</sup>Michel*, 1 *Crompt., Mees., & Ros.*, 177. And Sir *George Rose* in many cases, and, for one, in *ex parte Austin*, 1 *Dea. & Ch.* 207, appears to be of the same opinion as myself. If it became necessary to determine which line of decision should be followed, I should have wished to consider my judgment; but it appears to me that the question does not arise here, this not being a question between landlord and tenant, but between the assignees and the mortgagee.

All the cases decide, that where fixtures are attached by the landlord they become part of the freehold.—*Hubbard v. Bagshaw*, 4 *Sim.* 326.

Such is the general rule, having certain exceptions. If, therefore, the bankrupt attached these fixtures to his own freehold, they became part thereof; and therefore, on his bankruptcy, they were not goods and chattels in his reputed ownership. In *Lloyd v. Ogden*, 1 *Mont. & Ayr.* 494, I was of opinion that a distinction existed whether fixtures were attached by landlord or tenant, and I then differed from the judges who decided *Boydell v. M<sup>c</sup>Michel*, 1 *Crompt., Mees., & Ros.*, 177. Whether I should now agree or not I need not declare; but there all the circumstances would have attached to the property as goods and chattels; the sheriff might have seized them, and they would have gone to the executor. But no case has ever decided that such property, when affixed to the freehold by the landlord, were goods and chattels, unless indeed he subsequently detached them



again. This distinction was taken in *Steward v. Lamb*, and *Fagg v. Place*, 4 *Man. & Ry.* 477.

On the whole, therefore, the properties, being fixed by the landlord, were not goods and chattels in the reputed ownership, and passed to the mortgagee by conveyance of the property.

*Sir John Cross* : — It is clear these fixtures passed to the mortgagee. A conveyance of the freehold conveys whatever is fixed to it, and thereby becomes part of the realty. Confusion has sometimes arisen from the use of a term not applicable here, viz. “tenants’ fixtures.” There are none here; but in this case some of the fixtures are specifically mentioned, and others are not; and it has been argued that *designatio unius est exclusio alterius*. But conveyancers often introduce words which they know to be unnecessary to prevent disputes, because clients do not understand so well what will and what will not pass. These fixtures are unquestionably the property of the mortgagee. The other question is, whether the property be within the 72d section of 6 Geo. 4, c. 16; if not, *cadit questio*. There is no evidence of reputed ownership, and, in the absence thereof, the Court will not presume it; but the property was fixture, not goods and chattels. I therefore entirely agree with the Chief Judge, that the property did pass to the mortgagee, and was not in the reputed ownership. There may indeed be a few minor articles not fixtures, mere pieces of furniture. The iron fence is a fixture, not distinguishable from a wooden one. If there are hurdles of iron or wood, moved from day to day, or from season to season, they are not fixtures; but if put up as a permanent fence, they are.

*Sir George Rose* was absent.

1835.

*Ex parte*  
BELCHER.  
In the matter  
of  
MABERLY.



1835.

*Ex parte*  
BELCHER.In the matter  
of  
MADERLY.

Petition dismissed. Costs of the assignees out of the estate of the bankrupt; costs of the respondents out of their estate.

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C. of R.  
March 12,  
1835.

If an attorney, who is not admitted in the Court of Bankruptcy, employ an agent who is admitted to strike a docket, and after payment of the agent by the official assignee, the attorney, who is the principal, deliver a bill with charges for striking the docket, it is taxable.

*Ex parte* CASS.—In the matter of RIVERS.

THE petition stated, that in October 1834 a fiat issued against *Rivers*, under which *Cass* was the petitioning creditor, and who employed *Jordan* and Co., solicitors of Ware, to issue the fiat, and on other matters of business: that the petitioning creditor's bill of costs was made out by *Risley*, a solicitor of London, and taxed by the commissioners at 24*l.*, which was paid *Risley* by the official assignee; this was done without the knowledge of petitioner, or communication with him: that the bill is made out as that of *Risley*, but that in fact he acted as agent for *Jordan* and Co.: that *Jordan* and Co. had delivered to petitioner another bill of costs, containing charges relative to striking the said docket, not included in the bill so taxed by the commissioners: that such bill contained many extravagant charges, &c., and ought to be taxed: and that *Jordan* and Co. threatened to proceed at law thereon. The petition prayed that the bill might be referred for taxation.

The affidavit in reply stated, that *Jordan* and Co., not being admitted solicitors of the Court of Bankruptcy, requested *Risley*, who was, to strike the docket for them.

The bill sent by *Jordan* and Co. was, excepting a few items relative to striking the docket, wholly a conveying bill, but in the letter sending the same was included *Risley's* bill, and the following was in that note: "Messrs. *Jordan* and Co. present their compliments to



Mr. *Cass*, inclose their bill and also Mr. *Risley*'s, which has been forwarded to them for that purpose."

1835.

—  
*Ex parte*  
*Cass.*

In the matter  
of  
*Rivers.*

Mr. *J. Russell* for the petition:—Matters in bankruptcy not being taxable at law, the only remedy of the party is in this Court. Though the bulk of the bills in question be for business not taxable, yet if there be any taxable item, it renders the whole bill taxable. *Smith v. Taylor*, 5 Moo. & Pay. 66. Charges preparatory to and for striking the docket are taxable. *Ex parte Smith*, 5 Ves. 706.

Mr. *Bethell* for the solicitor:—When a docket is struck, the charges in the prosecution of the fiat are taxable, but charges for business done in contemplation of a fiat are not taxable under the summary jurisdiction. Moreover these bills have been paid, which estops the party paying from raising any objection. The only remedy the petitioner has is under the 6 Geo. 4, c. 16, s. 14, which enacts that the commissioner is to tax the costs, which has been done as to the petitioning creditor's bill; and the present bill is not for business done in bankruptcy. *Ex parte Wilson, Buck*, 475, decided that the Court has no jurisdiction to order the petitioning creditor to pay the solicitor his bill of costs, and consequently the Court cannot interfere against him.

Mr. *J. Russell*, in reply, was stopped.

THE CHIEF JUDGE:—For a short time I doubted whether the business was done by *Risley* in his own right or as agent. But he acted as agent for the solicitor in the country, and the reason he so acted was, that the country solicitors not being admitted solicitors of this Court were not able themselves to strike a docket,



1835.

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*Ex parte*  
Cass.In the matter  
of  
Rivers.

and therefore employed *Risley*. Part of the charges in the bill are incurred in bankruptcy, and part not in bankruptcy; and all the authorities prove that a solicitor cannot split a bill; all business done at the same time must be considered as in one bill, and any taxable items charged at any time draw in any otherwise untaxable items. In this case the only taxable items were in bankruptcy, so that if this Court has no jurisdiction, the petitioner is without remedy. It is said that the 6 Geo. 4, c. 16, s. 14, pointed out a particular mode and extent of taxation; but that clause only governs the mode in which the estate of the bankrupt is to be charged with the costs of the petitioning creditor.

*Sir John Cross* :—I entirely concur. It is a mistake to suppose that the taxation under 6 Geo. 4, c. 16, s. 14, is between the petitioning creditor and his solicitor; it is between the petitioning creditor and the estate; and in the solicitor's bill, up to the choice of assignees, there may be many items which, though rejected by the commissioners as not to be paid by the estate, may nevertheless be recoverable by the solicitor against his client, the petitioning creditor; and are such items not to be taxed? The charges in question never have been taxed, which they ought to be.

*Sir George Rose* :—The affidavits state that *Risley* acted as agent to *Jordan* and Co.; if so, there would be no relationship of solicitor and client between *Jordan* and Co. and the petitioner; but such was not the fact.

Taxation ordered.



*Ex parte* MRS. MASSEY and others.—In the matter of MASSEY.

C. of R.  
March 17,  
1835.

THIS was the petition of *Rebecca Massey*, by *T. Morgan* and *W. Montriou*, her next friends, and of the said *T. Morgan* and *W. Montriou*. It stated that in 1831 *R. Massey* (then *R. Cann*, widow,) procured a lease of a dwelling house on the Marine Parade, Brighton, called Clarence Mansion, and completely fitted up and furnished it, and expended in so doing 12,000*l*. In August 1831 Clarence Mansion was opened for the reception of company, and various persons lodged and boarded there. In November 1833 the petitioner married; the settlement was made between the bankrupt, the Hon. *G. L. Massey* of the first part, *R. Cann* of the second part, and *T. Morgan* and *W. Montriou* of the third part, and recited that a marriage was forthwith intended between the bankrupt and *R. Cann*, and that, on the treaty for the marriage, it was agreed that *R. Cann* should, so far as regarded her present and future property, be deemed and taken to have and enjoy all the rights and privileges of a *feme sole*, notwithstanding her intended coverture; and reciting that her property was of a personal nature, consisting principally of the furniture, household goods, plate, linen, china, wines, liquors, and other effects in Clarence Mansion, then used as a family hotel. It was thereby declared, that in case the said marriage took effect, *R. Cann* should be deemed and taken to be a single unmarried person, so far as concerned all property to which she then was, or during her intended coverture might become entitled, of whatever nature, quality, or kind soever, and should and might have, use, exercise, and enjoy, so far as concerned such property, all the rights, privileges, and powers of a single un-

Furniture, settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband.



1835.

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*Ex parte*  
**MASSEY.**  
In the matter  
of  
**MASSEY.**

married woman, as fully and effectually to all intents and purposes as she could or might have done in case the marriage had not taken effect, and she had continued unmarried; and in particular that she should, notwithstanding her coverture, use, continue, and carry on the business of Clarence Mansion as she had theretofore done and then did for her own exclusive benefit and advantage, she duly satisfying and discharging, by and out of her said property, all debts, contracts, liabilities, and obligations which might be incurred or entered into by reason of the said business, and therefrom saving harmless and keeping indemnified the said *G. L. Massey* and his estate and effects; and the husband thereby covenanted to do all necessary acts and deeds to vest the premises in *Morgan* and *Montriu*, as trustees, for the separate use of the wife. That on the 17th of November 1832 the marriage was duly solemnized, and the hotel continued to be conducted as before up to the 6th of March 1833; that up to the 12th of February 1834 *Massey* and his wife resided at Roehampton, and that on the 9th of September a fiat issued against *Massey*; that the assignees or the messenger had taken possession of the fixtures, furniture, wines, and effects in Clarence Mansion, and insisted that the same had passed to them.

The affidavits filed in reply alleged that the bankrupt had made advances for debts due on account of Clarence Mansion. It appeared the bankrupt had received various sums from time to time from his wife or her trustees.

Mr. *Swanston* and Mr. *Koe*, for the petition: — A woman may, before marriage, with consent of her intended husband, convey all her stock in trade and furniture to trustees to enable her to carry on her business separately, and if the husband do not intermeddle, such



effects are not liable to his debts.—*Jarman v. Woollaton*, 3 T. R. 618, *Haselington v. Gill*, 3 T. R. 620, in note. And where the possession of the parties is as trustees, or in pursuance of and under the terms of a trust-deed, property does not pay to the assigness in the event of bankruptcy.—*Ex parte Martin*, 2 Rose, 331 S. C., 19 Ves. 491. The wife is therefore a *feme sole* as to the property, and may contract with any person, her husband not excluded.—[CHIEF JUDGE:—You have to prove the agreement of the trustees in order to bring this case within *Jarman v. Woollaton*, 3 T. R. 618. If he permit his wife to trade he is liable to the bankrupt laws.]

1835.

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*Ex parte*  
MASSEY.  
In the matter  
of  
MASSEY.

Mr. *Montagu* and Mr. *Ching*, for the assignees:—Although, where there is any trust, it protects the property of the wife, yet the possession must be consistent with the title. In *Lingham v. Biggs*, 1 Bos. & Pull. 88, *Eyre, C. J.*, says, “I can suppose cases where a trustee for a married woman, permitting her husband to take possession of the goods and chattels, and to become the reputed owner to all the world, may lose the goods in consequence.”

It is therefore clear that there may be cases where trust property would not be protected. Is not this case an exception to the rule that trust property is generally protected?—[The CHIEF JUDGE:—The wife might be the agent of the trustees as to the possession of the furniture, and agent to her husband in carrying on the trade.]—That the possession must be consistent with the title is clear from *Darby v. Smith*, 8 T. R. 82, *ex parte Martin*, 2 Rose, 331, S. C., 19 Ves. 491, and *Haselington v. Gill*, 3 T. R., 20, in note. The wife’s property is to indemnify the husband against all sums paid by him in respect of the Clarence Mansion, therefore the assignees are at least entitled to an account of what sums have



1835.

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*Ex parte*  
MASSEY.

In the matter  
of  
MASSEY.

been paid by the bankrupt on account of Clarence Mansion, and to be indemnified thereout.

THE CHIEF JUDGE:—If the possession had been in the bankrupt, inconsistent with the terms of the deed, the property would have been in his reputed ownership; but the possession was in the wife alone,—all the husband did was to advance certain money. If his creditors are secured from loss in regard to the hotel, and from liability in regard thereto, then his separate creditors have nothing to complain of. *Massey* never lived there, and his creditors cannot have been deceived by the belief that he was the owner.

Sir *John Cross*:—The furniture, &c. was not in the order and disposition of the bankrupt, but the creditors are entitled to an indemnity.

Sir *George Rose* concurred in the order.

The order made was,—Declare the property in the petition mentioned is to be applied in satisfaction of all debts, contracts, liabilities, and obligations incurred or entered into by reason of the business in the settlement, and in the petition mentioned, and advances beyond these, if any, made by Mr. *Massey* by and on account of the business. Declare the estate of *Massey* is entitled to be saved harmless and indemnified therefrom, and subject thereto. Declare the petitioners entitled to the property in the petition mentioned; and if any inquiry or account be necessary to ascertain what liabilities the petitioners entered into, let it be taken on a reference to Mr. Gregg, the deputy registrar. Reserve costs; liberty for either party to apply.

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# CASES

## IN

### BANKRUPTCY.

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*Ex parte* COPELAND, assignee of Powis.—In the matter of THOMPSON and MILDRED, and in the matter of EVANS.

C. of R.  
Nov. 5,  
1833.

ON 1st December 1831, a commission issued against *Thompson and Mildred*.

On 22d December 1831, a commission issued against *Evans*.

On the 18th October 1832, a fiat issued against *Powis*, under which the petitioners were assignees.

*Evans* was a warehouseman and factor, selling goods on commission for various houses in Lancashire and elsewhere, to shipping merchants in London, and was desirous that it should not be publicly known he was personally concerned or interested in making shipments to foreign markets on his own account, either alone or jointly with other persons. *Thompson and Mildred* and *Evans* therefore made joint shipments under the following conditions:—*Evans* provided and delivered the goods to *Thompson and Mildred*, and he drew on them bills for the amount, which they accepted; and *Evans* engaged to renew such bills from time to time until the return

If there be three partners in a particular transaction, in which one furnishes the bills and the other two accept bills for the price, and it be agreed that the bills are to be paid out of the return proceeds of the goods, and the two acceptors become bankrupt, the indorsees of the bills, with notice of the agreement, are entitled to the benefit of it, after the joint creditors, if any, of the three are paid.

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The return proceeds are not in the reputed ownership, being clothed with a trust.



1833.

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*Ex parte*  
COPELAND.  
In the matter  
of  
THOMPSON  
and others.

proceeds were received, when such proceeds, after deducting all charges of shipments, insurance, sales, &c. were to be applied to the payment of such of the bills or renewed bills as should be running when such returns should arrive. With the goods delivered by *Evans* to *Thompson* and *Mildred*, invoices and acceptances were delivered, stating them to be bought by *Thompson* and *Mildred* in their own names from *Evans* at specific prices, but letters were signed, acknowledging that the goods were shipped on their joint account and risk, and that the proceeds were to be applied to payment of the bills drawn and accepted for such respective goods. *Thompson* and *Mildred* shipped the goods to their correspondents abroad in their own names, but accompanied by letters stating that they were shipped on the joint account and risk of themselves and *Evans*. *Evans* from time to time renewed the bills accepted on account of such respective shipments until the return proceeds were sent home, which were received by *Thompson* and *Mildred*, and by them applied, after payment of the charges of shipment, &c. to payment of the bills drawn and accepted on that account remaining when such return proceeds arrived, and the surplus, if any, was divided between *Thompson* and *Mildred* and *Evans* respectively, and the loss, if any, was borne by them equally.

Separate accounts of such joint shipments were kept by the respective bankrupts.

In September 1830 goods to the amount of 1,155*l.* 10*s.* were supplied by *Evans*, with an invoice, to *Thompson* and *Mildred*, which were shipped on joint account; and in a few days after *Evans* drew upon, and *Thompson* and *Mildred* accepted bills of exchange for the amount, and a letter on the subject of that shipment was drawn up by *Thompson* and *Mildred*, and signed by *Evans*, as follows:



“ Messrs. *Thompson and Mildred*.

1833.

“ London, 28th September 1830.

“ You having bought sundry goods from me, as per invoice, dated 21st September 1830, amounting to 1,155*l.* 10*s.* 5*d.* on a credit of nine months from 10th October, which goods, packed in thirty-six packages, are shipped on board the *Madeline*, *D. Dowson*, for Penang and Singapore, I do hereby acknowledge the above goods to be shipped on joint account of you and myself, each one half share, and I also engage to provide you with funds to meet my proportion, say one half, as the bills fall due, and also to renew your own proportions of one half until such time as the returns come home, you paying interest from and after the 13th July 1831. Nine months bills not suiting me, I now draw upon you two bills, one dated 21st September, at six months, for 497*l.* 3*s.*, and the other at six months, dated 27th September, for 658*l.* 7*s.*, and which I engage to renew at maturity.

*Ex parte*  
COPELAND,  
In the matter  
of  
THOMPSON  
and others.

“ Yours &c.

“ J. EVANS.”

*Thompson and Mildred*, about the 2d of October 1830, shipped the goods to Singapore, consigned to *Hunter and Co.*, (in which house *Powis* was interested in shipments from England,) accompanied by an invoice and letter, as follows:—

“ Invoice of thirty-six bales and cases shipped on board the *Madeline*, consigned to *Hunter and Co.*, Singapore, on joint account of *J. Evans* and *Thompson and Mildred*; account sales and returns to ourselves.”

“ Messrs. *Hunter and Co.* Singapore.

“ London, 2d October 1830.

“ Annexed, we beg to hand you invoice of thirty-six packages of manufactures, shipped by the bearer, *Madeline*, amounting to 1,507*l.* 3*s.* As the goods were selected and approved by you, Mr. *R. Hunter*, we hope they will



1833.

—  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

sell on arrival to good advantage, and encourage us to continue our consignments on a larger scale. You will observe the goods are shipped on joint account of Mr. *John Evans* of this city; but you will please to address your correspondence, account of sales and returns, solely to ourselves.

“Yours, &c.

“THOMPSON and MILDRED.”

*Thompson* and *Mildred* also effected policies of insurance on the goods sent out, and upon the returns home, which policies are entitled as follows:—

“Be it known, that *Thompson* and *Mildred*, and as agents, as well in their own name as in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause themselves and them and every of them to be insured, lost or not lost.”

The bills first accepted for these goods were renewed from time to time; and *Evans* being in want of cash, on the 2d September 1831 applied to *Powis* to discount the last set of renewed bills, two bills to become due on the 4th December, but which *Powis* refused to do on the personal security of the parties; but upon the representation of *Evans* that they were specifically drawn and accepted by *Thompson* and *Mildred* upon account of the joint shipments of goods consigned to *Hunter* and *Co.* at Singapore, and that the return proceeds were to be specially applied to the payment of these bills, *Powis*, believing that the return proceeds would be more than sufficient to pay such bills, did discount them upon such representation and agreement of *Evans*, and his engagement to do whatever *Powis* might require to secure him payment of the return proceeds.

The whole amount of the bills was handed over by *Evans* to *Thompson* and *Mildred* to provide for the prior set of bills.



*Powis* afterwards required a letter from *Evans*, confirmatory of the representation and agreement, and a letter, dated as of the day the transaction, was written, as follows:—

1833.

—  
*Ex parte*  
COPELAND.  
In the matter  
of  
THOMPSON  
and others.

“ *B. Powis*, Esq.

“ Sir,

London, 2d September 1830.

“ Enclosed, I hand you two bills drawn by *P. Morton*, dated Glasgow, 1st August, at four months date, viz. 562*l.* 7*s.*, and 593*l.* 3*s.*, amounting together to 1,155*l.* 10*s.*, due the 4th December next, and I shall esteem it a favour if you will discount the same.

“ In requesting this favour, I beg distinctly to state that you are not running the least possible risk, as the bills in question are the exact amount of sundry goods furnished by me, and shipped on joint account with *Thompson* and *Mildred* and myself in September 1830, and consigned to your correspondents, *Hunter* and *Co.*, Singapore; and on the return of the vessel, which may bring the proceeds for the joint shipment, I hereby engage that the same shall be applied in liquidation of the bills in question, in case *Thompson* and *Mildred* or myself should fail to do so; and further, I hereby pledge myself, under any circumstances you shall not be put to risk or inconvenience, viz. that you shall either have the homewards bills of lading representing this property placed at your disposal, or be put in possession of cash for the amount, viz. 1,155*l.* 10*s.* on or before the maturity of said bills. In confirmation of the above assurances, and to satisfy you, I beg to state that I furnished the goods in question, nor have I received any payment or part payment of the amount from Messrs. *Thompson* and *Mildred*, save and except their acceptances as per account furnished herewith, and which the enclosed represent under these circumstances, Messrs. *Thompson* and *Mildred* can have no claim for said returns till the bills in question



1833.  
 ———  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

are retired by them; nor have Messrs. *Thompson* and *Mildred* any interest or claim in this transaction further than the profit or loss arising from the joint adventure.

“ I am, sir,

“ Your most obedient servant,

“ JOHN EVANS.”

“ To Mr. *Benjamin Powis*,

“ 19, St. Helen's Place.”

*Powis* gave notice to *Thompson* and *Mildred* of his having discounted the bills, and they never dissented.

In January 1832, the assignees of *Thompson* and *Mildred* received the bill of lading of part of the return proceeds which *Powis* claimed.

The goods have been sold, and the proceeds amount to 984*l.* 4*s.* 7*d.*

This was a petition by the assignees of *Powis*, praying that they might be declared entitled to the 984*l.* 4*s.* 7*d.* and to any further return proceeds of the joint shipment when they arrive, and of the benefit of the policies of insurance to the extent of the bills of 1,155*l.* 10*s.*, and that the surplus might be equally divided between the assignees of *Thompson* and *Mildred* and the assignees of *Evans*.

Mr. *Montague* and Mr. *Goodeve* for the petition:—

In this case, the partnership being indebted to *Evans* for certain advances, accepted bills for the amount, and specifically pledged the return cargo as security of their due payment. The lien which *Evans* thus possessed he transferred to *Powis*. If bankruptcy had not intervened it would be impossible to contend that the claim of *Powis* was not sustainable, each partner having power to bind the partnership property in a *bond fide* transaction in the ordinary course of business. (a) But the

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(a) 1 *Salk.* 292. *Reid v. Hollinshead*, 4 *B. & C.* 867.



parties having become bankrupt, it is contended that the rights of *Powis* are thereby varied and diminished, and recourse is held to the doctrine of reputed ownership.

We contend—

First, No notice to the partnership was necessary to enable *Evans* to transfer his lien ; and,

Second, If such notice was requisite, it was actually given.

First, If no notice was necessary, there is an end of the question. Each partner having an undoubted right to bind the whole partnership property, *Evans* certainly could ear-mark a portion thereof, even without knowledge of his copartners. But,

Second, In fact there was notice, and notice one moment before the act of bankruptcy is sufficient to prevent reputed ownership. [Sir *George Rose*.—No doubt money borrowed on security of the partnership property, and carried to the partnership assets, becomes a partnership debt. So far as concerns the separate creditors of *Evans*, it was competent for him to give *Powis* a security to the amount of his (*Evans*) interest. The only question which could arise would be—his power so to bind without notice to his partners ? But it appears that notice was actually given to them, and that they did not dissent.] Even if there had not been no express contract with *Powis*, still, as holder of bills for the payment of which specific goods were pledged, he would be entitled to insist upon having the goods. *Ex parte Waring* 19 Ves. 350. S. C. 2 *Rose*, 182. S. C. *Mont*, Annual Digest, note 3 A. 51. S. C. 2 *Gl. & J.* 404. *Ex parte Parr. Buck*, 191. *Ex parte Perfect*, 1 *Mont.* 25. It may be insisted by the other side, that this is a case of reputed ownership. The question, however, cannot arise ; the goods not being in the possession of the bankrupts, *Thompson* and *Mildred*, but of the consignees, who had notice that

1833.

—  
*Ex parte*  
COPELAND.  
In the matter  
of  
THOMPSON  
and others.



1833.  
 —  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

they were shipped on a joint account of them and *Evans*.  
*Hunt v. Mortimer*, 10 *Barn and Cres.* 46. *Lyon v. Wel-*  
*den*, 2 *Bing.* 334. *Greening v. Clark*, 4 *Barn. and Cres.*  
 316. [The CHIEF JUDGE:—There is no pretence for  
 the proposition that the real and reputed ownership  
 were in different persons.] Under the terms of the agree-  
 ment, as contained in the letter of 28th September, the  
 property itself is liable for the amount of the bills till  
 the proceeds come round, and the bills themselves were  
 to be continually renewed till the proceeds did come  
 round, when such proceeds were to be used to retire the  
 bills; this is not expressly stated in the letter, but no  
 other interpretation can be made of the agreement to  
 renew the bills. [Sir *George Rose*:—That is the whole  
 question; whether on the face of the agreement it ap-  
 pears that the proceeds were to retire the bills.]

Mr. *O. Anderdon* and Mr. *Heathfield* for the assignees  
 of *Evans* :

First, The assignees of *Powis* have no lien on the  
 return proceeds, either directly through the contract, or  
 indirectly through any circuitous equity.

Second, If they have, the cargo was not in the re-  
 puted ownership of *Thompson* and *Mildred*.

Third, If they have, it is not confined to *Evans's*  
 share, but extends to the whole return proceeds; other-  
 wise theholders may prove against *Evans* for the residue.

First, To give a lien, there must be some writing; a mere  
 personal engagement is not sufficient. Is the letter from  
*Evans* a sufficient writing to give a lien on the property  
 of *Thompson*, *Mildred*, and *Evans*? *Ex parte Waring* has  
 been cited to establish the position, that one of a firm can  
 bind the partnership effects; but in that case actual pos-  
 session of the goods was given: there a lien was allowed  
 without a contract; here they insist on the contract.



But *Ex parte Waring* is so extraordinary a case that it is enough to say that it is not a precedent in the present case, the circumstances not being the same.

Second, No presumption of reputed ownership in *Thompson* and *Mildred* attaches the goods, not being in their possession, order, or disposition, part being at Singapore in the hands of *Hunter* and Co., and the remainder, on their passage home; and the possession of a factor or agent will not support a reputed ownership in the principal, *ex parte Taylor*, 1 Mont. 240. If the goods were in the order and disposition of any persons, it was in that of the three, *Thompson*, *Mildred*, and *Evans*, not of the two alone, a joint invoice having been sent accompanied by a letter explaining the transaction. Any presumption of reputed ownership in *Thompson* and *Mildred* is rebutted by the circumstance, that the goods were clothed in their hands with a trust for the benefit of themselves and *Evans*.

Third, If the assignees of *Powis* have any lien, it depends either on the bills being, under the original contract between *Thompson* and *Mildred* and *Evans*, a lien upon the goods to the benefit of which *Powis* became by circuitry entitled, upon the principle of *ex parte Waring*, 19 Ves. 345, *ex parte Parr*, Buck, 191, and *ex parte Perfect*, 1 Mont. 25, or on the agreement between *Evans* and *Powis*, and its adoption, express or implied, by *Thompson* and *Mildred*. The cases of *ex parte Waring*, &c. do not apply to the present, because they were cases of deposit by one of the parties to a bill of property to be held by another of the parties as a security for its payment, to the benefit of which deposit the holder of the bill, although no party to the agreement, became entitled by the circuitous equities between the depositor and deposittee. But here (in addition to there being no deposit, and the goods being in the hands of third parties) the holder of the bill was himself the person with whom the

1833.

*Ex parte*  
COPPLAND.

In the matter  
of  
THOMPSON  
and others.



1833.

—  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

agreement was made ; consequently there is no analogy between the cases.

If, however, the assignees of *Powis* rely upon the contract with *Evans*, then it is submitted, that being made without notice to the parties actually in possession of the goods (*Hunter and Co.*) it was ineffectual to give a lien in bankruptcy as against the assignees of *Evans*. *Hervey v. Liddiard*, 1 Stark. 123.

Finally, If the assignees of *Powis* can establish any lien, it must extend to *Thompson* and *Mildred's* share. Being a partnership transaction, he could bind the interest of his copartners, and consequently if the contract created a lien it extended to the entirety of the goods. If the lien rested on the ground similar to that allowed in *ex parte Waring* and the analogous cases it must necessarily extend to both moieties, and therefore if the assignees of *Powis* are entitled to any portion of the proceeds, they must not be confined to *Evans's* share alone, but must also resort to *Thompson* and *Mildred's* moiety, applying both equally as far as might be necessary in satisfaction of the bills.

Mr. *Swanston* and Mr. *Hughes*, for the assignees of *Thompson* and *Mildred* :—

The substance of the case is, whether any binding contract is established, and if so, whether the doctrine of reputed ownership applies.

It is clear that in the absence of the contract reputed ownership applies ; it becomes necessary therefore to consider the nature of the contract.

*Evans*, and *Thompson* and *Mildred*, were quite distinct firms, except in this particular instance ; and here any partnership which existed was dormant and unknown ; to all the world they appeared as they were, that is, vendor and purchaser ; the letter of 28th September 1830 changes the actual internal state of the transaction,



but does not alter its external appearance. *Evans* being *prima facie* entitled to the whole price of the goods, this letter was written, not for the purpose of establishing *Evans's* right to the goods, but in order to qualify the right to full and immediate payment which he otherwise would have, and it does not raise any lien; the object of the letter was to secure an indulgence to *Thompson* and *Mildred*, and also to protect them from the consequences of any accident which might happen to *Evans*, such as bankruptcy, which has happened, so that they might not be without written evidence to shew the actual nature of the transaction. But it would be most extraordinary to put such a construction on the letter as to give an advantage to *Evans*. This letter is the foundation of their case, and yet it does not support their claim. As to the letter from *Thompson* and *Mildred* to the agent, that, instead of assisting the petitioners, proves that *Thompson* and *Mildred* had the sole order and disposition of the goods, as all the return proceeds and correspondence were to be sent to them.

The case of *ex parte Chuck*, *Mont.* 457 (a), settles that a dormant partner's share of the partnership property is in the reputed ownership of the others. *Evans* being a dormant partner, the property in question was in the reputed ownership of *Thompson* and *Mildred*.

A very important question may indeed arise on the letter of 2d September 1831; but that letter can only bind *Evans*, by whom it was written, and cannot affect *Thompson* and *Mildred*. In a transaction between *A.* and *B.*, the letter of *A.* may bind *B.* when it refers to or qualifies a prior or pending transaction, or is subsequently confirmed by *B.*; but how can a letter from *A.* to a third person bind *B.* to a new agreement between

1833.

—  
*Ex parte*  
COPELAND.  
In the matter  
of  
THOMPSON  
and others.

---

(a) Mr. *Swanston* said that the latter part of the order in *ex parte Chuck* as to proof was unintelligible, in which Sir *George Rose* agreed.



1833.

—  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

*A.* and the third person to which *B.* is no party? [Sir *John Cross*. It is contended by the petitioner that the letter does refer to a prior agreement, and was subsequently confirmed. The CHIEF JUDGE:—It is contended, that, supposing *Evans* could not bind goods not in his hands, such a transaction not being in the ordinary course of partnership agency, yet that by the subsequent acts of *Thompson* and *Mildred* they admitted or recognized his right to so bind the property.] If indeed *Thompson* and *Mildred* dealt with or acted under the letters it might set up the transaction, but where and what dealing is there to give this letter effect as against them? [The CHIEF JUDGE:—It is stated in the petition, and not denied, that *Thompson* and *Mildred* actually drew up the letter themselves.] If so, and any intent to give a lien had existed, such intent would have been made apparent; they would not have drawn it up like an enigma which requires to be solved. Why did they not sign it? [Sir *John Cross*:—They appeared as purchasers, and took this letter as a protection, and kept it themselves, and consequently did not sign it. (a)] If *Evans* had acquired a right to bind the property, the assent or dissent of *Thompson* and *Mildred*, which is so much insisted on, was immaterial.

It cannot be contended that any legal lien exists, and it is inconsistent with legal principles, that one partner should be permitted to favour a particular person to the exclusion of the general creditors under the bankruptcy, by giving a private lien through the medium of a bill, on the face of which no such lien appeared.

As to the reputed ownership. It has been said, that the contract between the parties creates a trust which prevents the operation of the doctrine of reputed owner-

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(a) As a person does not sign the counterpart of a lease of which he has possession.



ship; to allow the goods to appear the property of *Thompson and Mildred*, and at the same time attempt to clothe them with a secret trust in favour of another, is precisely what the clause of reputed ownership was intended to prevent. [Sir *John Cross* :— If so, a party might set up a man in a shop, stock it, and take his bills for the price, and in addition take a lien, so that if a bankruptcy took place all the property would be swept away from the general creditors.]

If these goods were not in the reputed ownership of *Thompson and Mildred*, it would be difficult to say that it applied to any case in which the bankrupt had not the actual manual possession of the property. Here the goods were in the hands of *Hunter*, as the agents of *Thompson and Mildred*.

We submit, therefore,

First, That there is no evidence that *Evans* had any lien, or power to give any to *Powis*.

Second, If he had, it only extended to his own share.

Third, The property passed to the assignees of *Thompson and Mildred*, as having been in the reputed ownership.

Mr. *Montagu* was not called on to reply.

The CHIEF JUDGE :— The Court are unanimous in opinion that the petitioner is entitled to the declaration prayed.

The principle in *ex parte Waring*, 19 *Ves.* 350, is not necessarily brought into question on this occasion. In that case there was no privity of contract between the parties, and Lord *Eldon* decided that although there was no direct claim, yet that indirectly he would effect the same right. If there had been no contract or privity between the owners of the goods and *Powis*, it might have been necessary to consider how *ex parte*

1833.

—  
*Ex parte*  
COPELAND.  
In the matter  
of  
THOMPSON  
and others.



1833.

—  
*Ex parte*  
 COPELAND.  
 In the matter  
 of  
 THOMPSON  
 and others.

the bills, and that he is entitled to have the first proceeds so appropriated. And, independently of the subsequent recognition, I am of opinion that *Evans* had before the bankruptcy the right to that appropriation, and that he properly transferred it to *Powis*.

Sir *George Rose*:— This is merely a question of fact which the Court has found, that *Evans* and *Thompson* and *Mildred* were engaged in a joint adventure, and the goods were consigned by *Thompson* and *Mildred* to an agent abroad; but that consignee was the agent, not of them only, but of the three. If *Evans* had made his own share only liable, it might have been a question, whether his separate creditors were not primarily entitled; but the petitioners claim a right against the interest of the three. I think it would have been extremely difficult to contend that the three could give any such lien as against any joint creditors of the three; but there are none. With regard to Mr. *Swanston's* argument, as to it being in the order and disposition of *Thompson* and *Mildred*, he forgot that he was also assignee, not only of them, but also of the separate estates of each, and it is not clear that these separate estates, and not the joint, would be entitled. It was perhaps most material to his interest to contend that the two were entitled. I concur with the Court.

The order made was, that the costs of all parties be paid out of the fund, and that the joint creditors of the three, if any, be permitted to prove, and, after joint creditors paid, surplus be applied in payment of *Powis's* bills and all others similarly situated, and the surplus, according to the interest of the partners. (a)

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(a) See *ex parte Clare, Cooke*, B.L. 370.



*Ex parte* JONES and others, Trustees of the Carmarthen Savings Bank.—In the matter of JONES.

C. R.  
Dec. 19 &  
20,  
1833.

**T**HIS was a petition to prove the sum of 7,564*l*.

The bankrupt was acting clerk or cashier of the savings bank (*a*) at Carmarthen, and his duty was to receive and pay all deposits, and, after deducting current disbursements, to pay the balance into a banker's at Carmarthen.

In May 1833, one of the managers having discovered false entries in the books, took them from the bankrupt's custody, and delivered them to *White*, the present actuary or clerk.

The balance then appeared in favour of the bank to be 707*l*., but on examination it was found to be 7,564*l*., the difference being covered by false entries of sums received and paid, and by omissions of sums received.

The course of business was as follows : —

The bankrupt attended twice a week to receive deposits, and at the same time a manager attended. Every sum deposited was entered regularly by the bankrupt in his ledger ; at the same time the manager made a similar entry in his check-book. At the close of each day these two books were signed by the manager, and kept in the custody of the bankrupt.

The alterations were principally made in the bankrupt's cash-book, of which some of the entries of payments made by him were altered by the addition of an 0 or a 1, so as to make 10 into 100, 100 into 1,000. He then altered his cash-book and the manager's check-book to make them tally. It could not be ascertained when these alterations were made.

Where an actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt, and five indictments were preferred, which failed from technical reasons, which would apply to any other indictment, the proof was allowed for the whole sum embezzled.

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(*a*) Established under the 57th Geo. 3. c. 130.



1833.

—  
*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

The bankrupt had signed a paper, admitting that he owed the sum in question (7,564*l.*) to the savings bank ; and, on his examination before the commissioners, he was asked, “ as there are several alterations in your cash-book and manager’s book, will you explain when and by whom such alterations were made ? ” to which he answered, “ I object to answer that question, lest I should criminate myself.”

An application was made to the commissioners to admit the proof. They declined to admit it till the trustees had prosecuted the bankrupt for felonious embezzlement. The trustees accordingly preferred five indictments, on three of which the bankrupt was acquitted ; and the other two were withdrawn, at the suggestion of the judge, there being technical difficulties in the way of his conviction.

On again going before the commissioners they refused to receive evidence as to any sums but those included in the indictments ; and of the latter some were rejected on grounds not necessary to state ; others were rejected on the deposition of a witness, “ that, but for the charge of fraud against the bankrupt, he should have thought the alterations on that day were made in the books by *Evans*,” a manager, since dead, leaving considerable property, and said to have been a most respectable man ; whereupon these proofs were also rejected, on the ground that *Evans* might have embezzled the sums.

The accounts of the savings bank, filed in the National Debt Office, and signed by the managers, having been produced, and these accounts tallying with the fraudulent accounts, the commissioners decided that these must be presumed, *primâ facie*, to be correct, and that sufficient evidence was not produced to rebut that presumption ; that consequently the trustees were estopped from shewing that the entries in the books were false, or



that the bankrupt had not properly applied the monies ; and, finally, they decided that the trustees could not prove for any sum.

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

Mr. *Twiss* for the petition (with whom was Mr. *J. Russell*) :—

There are two principal questions in this case.

First, whether a proof can be tendered for sums not included in the indictments?

Second, Whether the negligence of the trustees, in passing the bankrupt's accounts, and in making up those for the National Debt Office, estops them from tendering a proof, or is any protection to the bankrupt.

First, As to the sum of 707*l.*, being the balance admitted to be due by the bankrupt himself on the accounts as they now stand, putting fraud out of the question, the right to prove is too clear to admit of argument. But we claim beyond that a sum of 6,857*l.*, of which 1,254*l.* was included in the five indictments.

The evidence in support of this claim is that of *White*, who has examined the accounts, and finds such to be the balance ; and of the bankrupt himself, who admitted that to be the sum actually owing from him to the bank.

Second, As to the prosecution. The commissioners rejected all sums not included in the indictments. No doubt there is a principle, founded on public policy, that a party shall not prove a debt arising through a felony, till he has satisfied public justice by instituting a prosecution against the felon.

In *Stone v. Marsh*, 6 *Barn. & Cres.* 562, it was held, that where a partner forged a power of attorney for the sale of stock, of which the dividends were payable to the partnership, the partnership was liable to the owner of the stock. And in *ex parte Bolland*, *Mont. & Mac.* 315,



1833.

—  
*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

it was held, that under such circumstances the owner might prove against the partnership, though he had not prosecuted or given evidence against the felon; but though such were the decisions, yet in both cases the judges certainly appear to have been of opinion, that unless there was a trial the owner could not recover his property. Summary restitution in court, no doubt, depends on conviction; that originated under the statute of Henry VIII., which gives judges power to award a writ of restitution. On this idea the commissioners appear to have proceeded, when they decided that they could allow proof only on the sums included in the indictments. All the law requires is, that the party should use due diligence in prosecuting, for conviction is not necessary, as was decided in *Crosby v. Long*, 12 *East*, 409.

In obedience to the opinion of the commissioners, the trustees preferred five indictments, each including, according to the statute, three specific charges (a) for felo-

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(a) 7 & 8 Geo. 4. c. 29. s. 48. any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of

“ And, for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders, be it enacted, that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to



viously embezzling items to the amount of 1,254*l.* But the bankrupt had so contrived the fraud that it was not possible to find him guilty under the terms of the statute. Having, however, done their duty to the public, they ought to have been allowed to prove. But the cases do not support the proposition, that prosecution is absolutely necessary.

The observations of Lord *Tenterden*, in giving judgment in *Stone v. Marsh* (a), furnish a clear view of the law, and are peculiarly applicable to the present case. His Lordship's words are, "The transfers were made, and the money received, in pursuance of a felony committed by a member of the defendant's house. Can the house set up this felony as an answer to the plaintiff's claim? In general a man cannot defend himself against a demand by showing, on his part, that it arose out of his own misconduct, according to the maxim, '*Nemo allegans suam turpitudinem est audiendus.*' There is indeed another rule of the law of England, viz. that a man shall not be allowed to make a felony the foundation of a civil action,—not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, for this he may do if there has not been a sale in market overt,—but that he shall not sue the felon; and it may be admitted, that he shall not sue others together with the felon in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own showing, to be founded on the felony of the defendant. *Gibson v. Minett*, 1 *Hen. Bl.* 612. This is the whole extent of the

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

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coin or valuable security may party delivering the same, and have been delivered to him in such part shall have been re- order that some part of the value turned accordingly." thereof should be returned to the (a) 6 *Barn. & Cres.* 562.



1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

rule. The rule is founded on a principle of public policy; and where the public policy ceases to operate the rule shall cease also. This point was very ably shown in the argument on the behalf of the plaintiffs. The authorities were quoted, and need not be repeated; and it was shown that the familiar phrase, 'the action is merged in the felony,' is not at all times literally true. Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition or a felony, without suit, and of course cannot be allowed to maintain a suit for such a purpose. But it is not contended, that any such policy or rule is applicable to the present case; the offender has suffered the extreme sentence of the law for another offence of the same kind. It does not appear that the plaintiffs had any knowledge of the particular forgery mentioned in this case, at such a time as might have enabled them to bring the offender to justice sooner; or even if they had been acquainted with the fact of the forgery, that they could, in ignorance of the place of the forgery, and of the means by which the forged instrument was placed in the Bank of England, have instituted a prosecution with success. And it was very properly admitted by the learned counsel for the defendants, that he could not contend that an action might not be maintained after conviction of the felon. But it was contended, that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or to a felonious act, and that here the plaintiffs were seeking to ratify the felonious act of *H. F.*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect; in fact the



plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand.

“ The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made. If public policy had required that the felonious inducement should prevent a claim to the money afterwards received, as it would do if an action were brought against the felon for the money received by a transfer obtained by his felony, in lieu of a prosecution for the felony, a defence of another kind would be given. But that is not the present case; and not being so, we think the plaintiffs may entirely pass by the felony, and rely on the transfer and receipt of the money, and that the defendants cannot protect themselves against the demand for the money which they have received, by shewing this felony on the part of one of the members of their house.”

If a man steals my watch, I must indict him before I can maintain the civil action of trover, because his possession of my property was through a felony. In this case the means whereby he became possessed of the money were lawful, and his civil liability attached the moment he received the money. He not only had a right to receive the money, but it was his duty so to do. Upon such receipt his civil liability accrued; and his having afterwards committed a felony does not deprive the trustees of that civil remedy, and merge it in the felony.

[Sir George Rose : — The felony would not merge the remedy, only suspend it, till after prosecution.

The CHIEF JUDGE : — One question is, whether you

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES



1833.

—  
*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

can establish your case on the basis of liability alone, without touching on the felony ; and if so, whether the other side can set up the felony.]

The trustees prove that the bankrupt received the money, and put it on him to discharge himself; can he do so by pleading his own felony ?

The Court here stopped Mr. *Twiss*.

Mr. *J. Russell*, in answer to a question from the Court, said, in equity a party cannot plead his own felony. He could protect himself from answering particular criminatory questions in the bill, but could not plead felony, because every party is bound to prove the truth of his plea, and the great absurdity would follow, that he must prove himself a felon.

Mr. *Swanston* and Mr. *Chandless* for the assignees : —

The commissioners were right in rejecting the proof *in limine*, it being a rule, that, when a felony has been committed, the party injured cannot prove till he has *bond fide* prosecuted the felon. In this case the prosecution was not *bond fide*; it was collusive; the best evidence was not produced, nor those items selected on which the clearest proof could be given; the consequence was, that the prisoner was acquitted for want of proof that the money ever came into his hands. Various other items might have been selected on which the proof would have been more easy, and on which the bankrupt might have been found guilty.

[*Per Curiam* : — If you are confident on that head, we will allow you to have another prosecution instituted on any item you may point out, provided you will take the risk of paying costs personally if it fails as the others failed.]

The same defect of evidence of receipt by the bankrupt which prevented his conviction will prevent the



proof being established in this Court. As to the items not included in the indictments, no proof can be tendered for them, under the general rule acted on by the commissioners, that no proof on any sum can be allowed, in cases of felony, till a prosecution has been instituted with regard to that sum.

The trustees in this case are in *pari delictu*; for without extraordinary negligence on their part the bankrupt could not have embezzled 7,564*l.* in eight years. The trustees, therefore, have no right to call on this Court to assist in indemnifying them against the consequences of their own misconduct.

The evidence produced by the petitioners clearly proves that some of the entries in the managers' books were altered by the managers themselves.

[The CHIEF JUDGE:—They are only small items, and do not affect the general question.]

It has been suggested, that the technical difficulty in the way of the prosecution was, that no particular sums could be proved to be embezzled. That is not necessary; for in *Rex v. Hall*, 3 *Stark.* 67, a clerk, after receiving six bank notes, made a false entry to conceal the receipt of that particular sum; but he was proved to have subsequently paid over those very notes to his master; nevertheless he was found guilty.

[*Per Curiam*:—No doubt. If he had once embezzled the particular notes, and made a fraudulent entry, subsequent repentance would be of no avail. But in this case it cannot be proved that *Jones* intended to embezzle any particular sum on any particular day. His fraudulent alterations were intended to cover some fraudulent appropriations at some former time; but what sums these were, or on what day, cannot be shewn.]

Mr. *Twiss* was not called on to reply.

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.



1833.

The CHIEF JUDGE: —

—  
*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

The commissioners originally rejected this proof, on the principle that the bankrupt had committed a felony for which he had not been prosecuted. The trustees thereupon instituted a prosecution, and preferred five indictments, including sums to the amount of 1,254*l*. The commissioners then refused to allow a proof to be tendered as to any sums not included in the indictments. In this they acted erroneously.

A proof, resting on a felony, cannot be made till after a prosecution, except where conviction is hopeless.

If, in the course of an inquiry in order to proof, it appears that the real injury done, and on which the proof rests, is through a felony, principles of public policy require that justice should first be satisfied by a prosecution. I do not indeed find that proposition laid down *totidem verbis* in any of the cases, but their principle appears to go to that extent. When a party, however, shows that the circumstances are such that he has no chance of procuring a conviction, this Court would not refuse to hear him to establish his proof. That only happens under circumstances when a judge would say to a jury, "I leave this case to you," without directing them to acquit. If the case is not such as to justify the judge in so doing, it would not be a case in which the party should be shut out from proof. The evidence which could be brought forward in this case would not support a prosecution under the 7 & 8 Geo. 3. c. 29.

If a particular sum could be ascertained as having been received on a particular day, and not entered, or falsely entered, there would be a fact to go to the jury. But in this case all entries of receipts are correctly made at the time, and the discharges on the opposite side of the account are falsified by additions of figures, but when that is done is not known. But, to insure conviction under the statute, it is absolutely necessary to point out



a particular sum which on a particular day was embezzled. Here the alterations were made perhaps months, perhaps years afterwards.

In this case five indictments were presented: quite enough to satisfy public justice. If no debt could be proved because not included in an indictment, the petitioners must present thirty or forty indictments at least (a), to the great expenditure of their money or that of the public, and that in a case where there was no chance of success.

In *Fawcett's* case one of the questions was, whether there was any debt existing at the time of the bankruptcy, of which there can be no question in this case.

The trustees must be admitted to prove for such sums as can satisfactorily be established to have been received by the bankrupt.

Sir John Cross: —

It is to be hoped that this case will act as a caution to the trustees and others having the management of the numerous savings banks in this kingdom, the collective funds of which appear, by the returns lately made to Parliament, to amount to the sum of 15,000,000*l.* Gentlemen too often conceive they do enough in giving the sanction of their names to these banks, without looking into the accounts; but questions may arise as to whether they are not personally liable for the defalcations of persons employed by them in capacities similar to this bankrupt.

The commissioners rejected the debt, on the grounds that public policy required a prosecution. I once heard it said by a venerable judge of former days, that when

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

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(a) Only three distinct acts of embezzlement can be charged in one indictment, 7 & 8 Geo. 4. c. 29. s. 48.



1833.

*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

judges once get upon a question of public policy it carries them away like an unruly horse. And so it happened with these commissioners; for though I do not intend to imply that they were guilty of any dereliction of duty, yet they certainly allowed the principle to carry them much too far, when they refused a proof on any sums not included in the indictments; and it is even doubtful whether they could be borne out in the principle that any prosecution at all was necessary in this case. I am of opinion that they put a forced construction on a penal act. The statute 7 & 8 Geo. 4. c. 29. speaks of master and servant. The relation between master and servant is a private one, which did not exist between the trustees and their actuary or cashier, who is a public officer. The commissioners appear to have looked only at the 47th clause, and thereupon to have pronounced this misappropriation of the bankrupt's to amount to a felony. If they had turned their attention to a subsequent clause, the 49th, they would have found it precisely applicable to this case, which is an embezzlement by an agent of property entrusted to his care, which, by this 49th clause, may be treated as a misdemeanor only; then it became optional whether to prosecute or not. If the commissioners had treated this case as under the 49th section, they could have compelled the bankrupt to answer all their questions, because, as by the 52d clause his examination could not have been used against him, he could not object to answer; whereas by going on section 47, and treating it as a felony, his examination was not so protected, and he was enabled to shelter himself by the plea that the reply might criminate him. But even if the bankrupt had been a servant there is only a general deficiency on a running account, which



does not amount to a felony. The Savings Bank Act (*a*) provides that the actuary shall give security for the faithful discharge of his duty, by a bond to the clerk of the peace, who may sue thereon for any breach of duty; consequently the act intended the actuary should be personally liable.

1833.

—  
*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

Even if this had been a case of felony within the act (*b*), it was not the duty of this Court to examine minutely every page of the accounts to endeavour to discover a felony. To induce a court to interpose the principle of not allowing proof before prosecution the felony ought to be *prima facie* flagrant, and such as the court could not overlook.

In the present case, select which particular instance you will, it would not be possible to prove but that *Jones* had properly applied that sum. The mere omission in his books of an entry how he expended the money is no felony; he might have paid it away properly, and was not bound to enter his payments within any particular period; *non constat* but that he would make the entry at some future time.

It is therefore my opinion that proof ought to be allowed for the full amount of the deficiency.

*Sir George Rose* : —

The gentlemen who lend their names to these savings banks may find themselves much mistaken if they conceive themselves not liable to make good the deficiencies of their actuaries.

The Court is not called upon to make any declaration of its opinion whether or not the commissioners were right in the principle that there could be no proof before a prosecution, because the trustees conceded the

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(*a*) 57 Geo. 3. c. 130. s. 7.

(*b*) 7 & 8 Geo. 4. c. 29.



1833.

—  
*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

principle, and a prosecution was instituted. I will however observe, that in *Fauntleroy's* and the other cases, one question was, whether a claim could be set up through a felony; whereas in this case the party endeavours to defend himself through a felony, which is quite another thing. The counsel for the assignees have thrown out some imputations as to the prosecution being collusive; but those imputations rest on the allegation of counsel alone, and are not, in my opinion, supported by a tittle of evidence.

The sum of 707*l.*, the admitted balance, not having been tendered before the commissioners, no observation arises thereon. As to the other sums, satisfactory evidence was tendered before the commissioners: not only did the parties tender their own affidavit, but the evidence of an accountant was produced, who declares, that having gone through the books, the result is, that a certain balance is owing. Moreover, the bankrupt, being examined, refuses to answer, lest he should criminate himself. Surely all this is evidence enough for the commissioners to act upon.

This creates a debt upon a balance, and the assignees were at liberty to show that the supposed balance was not correctly stated; that is, they might object to the items, but not to the whole proof.

This proof, therefore, should go back to the commissioners, protected from the general objections started, and only open to reduction as to items of the account. The sum of 7,564*l.* should be considered as *prima facie* the sum to be proved, subject to deduction as to any particular items. There is a technical difficulty as to who is to prove, which has not been noticed.

The Savings Bank Act (a) enables the trustees "to

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(a) 57 Geo. 3. c. 130. s. 8.



bring or defend, or cause to be brought or defended, any action, suit, or prosecution, criminal as well as civil, in law or equity;" but it is doubtful, according to the cases, whether a country commission is a proceeding at law or equity: that difficulty will, however, be provided against in the order.

Mr. *J. Russell* applied for the costs of the petition, in accordance to the case of *ex parte Fiske, Mont. & Mac.* 93, where, as in the present case, the petitioner's proof had been stopped by a preliminary objection, and where the Vice Chancellor gave the costs of both parties out of the estate; on appeal to the Lord Chancellor, the general rule was urged, that costs are never given against a decision of the commissioners (a), but Lord *Lyndhurst* said, "In one view of the case, it is undoubtedly hard that the estate should have to bear the costs of an erroneous decision of the commissioners; on the other hand, it would be equally hard that the petitioner should have to bear the costs in a case where his attempt to prove was stopped *in limine*, and where he was consequently compelled to resort to the court for relief. Under these circumstances, I think the costs of all parties should be paid out of the estate."

*Per Curiam* :—This is not a case where the Court will depart from the usual rule. Each party must pay their own costs. The assignees will take theirs out of the estate. No order is made concerning those of the trustees. Probably they will be able to take theirs out of their own funds.

The following order was made :—

Declare that the petitioners ought not to be required

1833.

*Ex parte*  
JONES  
and others.  
In the matter  
of  
JONES.

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(a) *Mont. B. L.* 301. *Eden, B. L.* 461.



1833.

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*Ex parte*  
 JONES  
 and others.  
 In the matter  
 of  
 JONES.

to institute any further proceedings against the bankrupt; and declare that *prima facie* the amount of 7,564*l.* found by *White* is the amount to be received in proof, but subject to such deductions as the assignees can establish to the satisfaction of the commissioners. Let the petitioners, some or one of them on behalf of the others, or the trustees of the savings bank at the time of the bankruptcy, be at liberty to make such proof. The assignees to take the costs of this petition out of the bankrupt's estate (a).

The commissioners having improperly rejected a proof because the claim was merged in a felony, the petitioner was allowed costs out of the estate.

(a) The following case appears to have been very analogous to the present :

*Ex parte Birks* in the matter of

V. C. 16th August 1827.

Mr. *Horne* and Mr. *Whitmarsh* for the petition :—This is a petition to prove. The bankrupt was clerk to the petitioner, and the proof has been rejected by the commissioners on the ground of his having committed a felony.

Mr. *Heald* and Mr. *Montagu* for the assignees :—The bankrupt was a clerk; he received his master's money and misapplied it; that is declared felony by the act of parliament; the right to prove, which is a civil right, is therefore merged in the felony. *Ex parte Walter re Stokes*, 5th December 1806. *Ex parte Shaw*, 1 *Mad.*

Mr. *Horne*, in reply, was stopped by the Court.

The Vice Chancellor said the

bankrupt had been guilty of felony; but made the following order :—Declare that the petitioner has a right to prove; and let him go before the commissioners, and tender his proof. The creditors being at liberty to investigate the debt.

Assignees costs out of the estate; and the Vice-Chancellor will think of the petitioner taking his costs out of the same estate.

August 17.

VICE CHANCELLOR :—On general principles I allow the petitioner his costs out of the estate. Suppose a case in which the dividend would not be equal to the costs,—how a *bond fide* creditor suffers.

The petitioners to be at liberty to call a meeting at their own expence to tender their proof.—*Reg. Lib.* V. C. pp. 61, 65, August 16th and 17th, 1827.



*Ex parte* BOARDMAN.—In the matter of  
BOARDMAN.

April 23,  
1835.

MR. AYRTON applied to supersede a fiat with consent of all the creditors who had proved, and who had all consented to accept a composition under 6 G. 4, c. 16, ss. 133, 134. The commissioners had appointed two meetings under the 1 & 2 W. 4, c. 56, s. 20, and at the first meeting assignees were chosen.

When the commissioner appoints two meetings under 1 & 2 W. 4, c. 56, s. 20, the fiat cannot be annulled with consent of the creditors under 6 G. 4, c. 16, ss. 133, 134, till after the second meeting.

*Per Curiam* : — The second meeting has not yet taken place. This application cannot be granted till then, as other creditors may then come in and prove.

Application refused. (a)

*Ex parte* MASTERMAN.—In the matter of LITT.

C. of R.  
April 24,  
1835.

THE petition stated that in February 1831 *Litt* by indenture assigned to the petitioners 150 shares of the Crown Life Assurance Company, then standing in the name of *Litt* in the books of the company, subject to redemption on payment of a sum therein mentioned, and with a power of sale, and covenant for further assurance. This deed was prepared by one of a firm who were solicitors to this company. The petitioners gave the usual notice to the company of this indenture and the transfer, and an entry was made thereof in the ledgers of the company's books. A fiat issued against the bankrupt in June 1831. On application to the

If the owner of shares in an insurance company assign them by way of mortgage, and give notice to the company, but owing to an informality in the assignment the company do not recognize the mortgagee's title, and the shares still stand in the bankrupt's name, the shares are not in his reputed ownership.

(a) This application, under 6 G. 4, c. 16, s. 133, could not be till after the third meeting;

and now the second meeting is virtually the third meeting.



1835.

—  
*Ex parte*  
 MASTERMAN.  
 In the matter  
 of  
 LITT.

company by the petitioners they were informed that the transfer had not been made in pursuance of certain clauses in the deed of settlement of the company, so as to give the petitioners a right to the shares, and that a new or further transfer in proper form was necessary to entitle them to the shares. The clause in question directed that the company and directors should not be bound by any trust or mortgage, and that the *cestui que trusts* or mortgagees should have no rights but through the trustee or mortgagor; and that no person was to be allowed to sell any shares without the consent of the weekly board, and that no shares should be transferred but by a deed in writing in a form prescribed, and that in case of the bankruptcy of a proprietor his assignee was to be proprietor for all purposes. *Litt* the bankrupt was a director, and opposite his name and shares, in one of the books, was written in pencil, “*Not to be transferred. See Haddan and Co.’s notice of the 23d February 1831.*”

This was the usual petition by an equitable mortgagee, praying for a sale of the shares in the usual way.

Mr. *Blackburn* for the petitioner:—The only case apparently adverse to the petitioners is *ex parte* the *Lancaster Canal Company*. (a) But there the party could have received the dividends on the shares, and stood in the books as owner; here notice was entered in the books. As to the nonconformity with certain forms, that can have no effect as to the public, being made for the private regulation of the company.

Mr. *Montagu* (who was with Mr. *Blackburn*) was stopped by the Court.

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(a) *Mont. & Bli.* 94. S.C. 1 *Dea. & Ch.* 411.



Mr. *Swanston* and Mr. *Rogers* for the assignees:—  
The principle of the decision of *ex parte* the *Lancaster Canal Company* (a) must govern this case. [Sir John *Cross*:—In that case there was a statute.] Private acts are construed, as between the parties, as if contracts; and the same rules of construction prevail as in deeds. The assignees resist this claim, because there was no transfer of the legal interest which remains in them, and the Court will not decree specific performance of a contract relating to an equitable interest, as stock, &c., and because the property was in the reputed ownership of the bankrupt. According to the rules of the company the legal interest has not been transferred; and in cases where the bankrupt has once been the owner, even if he actually cease to be so, yet he is the reputed owner, unless he do some act to divest himself of his apparent ownership. *Lingard v. Messiter*. (b) In this case there were no *indicia* of mutation of ownership; the book was private; to have made it public would have defeated the object of the parties. Moreover, the bankrupt was, or acted as, a director; fifty shares are necessary to qualify him as such, therefore he certainly was the reputed owner as to fifty shares; and as no particular fifty can be fixed on, he is reputed owner as to the whole.

1835.

—  
*Ex parte*  
MASTERMAN.  
In the matter  
of  
LITT.

THE CHIEF JUDGE:—The arguments against the petition are, 1st, That the bankrupt was the real owner at his bankruptcy, because the forms necessary to transfer were not complied with; 2d, That if not, he was reputed owner, or retained the order and disposition of the shares. As to the first reason, all cases of equitable mortgages

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(a) *Mont. & Bli.* 94. S. C. 1 D. & C. 411.

(b) 1 *Barn. & Cres.* 308. S. C. 2 *Dow. & Ry.* 495.



1835.  
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*Ex parte*  
 MASTERMAN.  
 In the matter  
 of  
 LITT.

depend on the same fact, viz. that the bankrupt has not transferred the legal interest, but only the equitable right. When parties are solvent, equity does not interfere to decree specific performance of a contract to assign a chattel, as bank stock, &c., because damages will be complete compensation; but that is not the case when bankruptcy intervenes, and where one of the parties is not solvent, so that no damages would be paid. As to the second reason, the shares were regularly assigned by a deed to the petitioners, who gave notice to the clerk of the company, who made an entry in the books, all which would have been told to any applicant; there was no collusion or fraud or secret understanding that the bankrupt was to be held out as reputed owner, all which distinguishes this case from *ex parte the Lancaster Canal Company (a)*; in which case Lord *Lyndhurst* held it to be the intent, that the bankrupt should continue reputed owner, and where no entry of the transfer was made in any book, which made out a case of collusion and fraud, and created that reputation of ownership which the 6 Geo. 4, c. 16, s. 72, was intended to prevent.

Sir *John Cross* : — As to reputed ownership, it appears to me that the decisions have gone too far in not requiring proof from the assignees of the reputation of ownership. The act seems to require that the assignees should prove the fact.

Sir *George Rose* : — In equity the practice has lately been much extended to enforce specific performance of contracts not strictly relating to the realty, the Court being guided by the consideration whether or not damages will be an adequate remedy. In cases like the

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(a) *Mont. & Bli.* 94. S. C. 1 *Dea. & Ch.* 411.



present, the respondents are entitled to the benefit of the rule, that the Court will not interfere if there be the least doubt; therefore, if there be a question of reputed ownership raising any doubt in the mind of the Court, the Court should not interfere. In this case the mere notice would have been enough, according to the cases. Notice acts thus: it informs the parties that some check on the power of order and disposition exists; this puts him on his inquiry; therefore, in cases of debt, trust, &c. mere notice prevents the consequences of the 72d section of 6 Geo. 4, c. 16. Here the ledger book, containing the intimation of ownership, conveys the notice; *ex parte* the *Lancaster Canal Company* (a) does not govern here. That is a case of an act of parliament: this a mere joint stock company.

Ordered as prayed. Costs of each party out of their own estate.

1835.

*Ex parte*  
MASTERMAN.  
In the matter  
of  
LITT.

*Ex parte* SMITH.—In the matter of SMITH.

MR. AYRTON applied for the usual four-day order on a party to pay a sum or stand committed. (b)

*Per Curiam*: — There is no necessity to apply in open Court for the usual four-day order when all is regular; the order may then be procured, as of course, at the office.

C. of R.  
April 25,  
1835.

When all is regular, the four-day order to pay, &c. or stand committed, is of course at the office.

(a) *Mont. & Bli.* 94. S. C. 1 *Dea. & Ch.* 411.

(b) See *ex parte Myers, ante*, 87.



April 25,  
1835.

Where a trustee becomes bankrupt, the general rule is, that the Court will not appoint a new trustee under 6 Geo. 4, c. 16, s. 79, without a reference, unless all parties are before the Court. The smallness of the estate may furnish an exception.

*Ex parte* WHISH.—In the matter of SANDYS.

A trustee having become bankrupt, this was a petition praying the Court to appoint a new trustee under 6 Geo. 4, c. 16, s. 79.

Mr. *L. Wigram* for the petition.

Mr. *J. Parker* for the assignees.

*Per Curiam*: — The Court will at once grant an application that a bankrupt trustee (or, what is more usual, some other person) may prove where the dividends are to be paid into the bank, &c. But if a new trustee is to be appointed for all the purposes of the trust under section 79, then, unless all parties be before the Court, a reference must be made to the master to approve, &c.: that is the general rule. The funds being too small to bear the expense of the reference might induce the Court to depart from that rule.

C. of R.  
April 25,  
1835.

Where (the bankrupt having absconded) an equitable mortgagee enters into possession of the premises, and the assignees afterwards acquiesce in his continuing in possession, he is entitled to the profits before the order of sale, and from the time of his entry.

*Ex parte* BIGNOLD.—In the matter of POSTLE.

THIS case is reported *ante*, page 16, where it was decided that an equitable mortgagee was not entitled to the rents and profits before the date of the order of sale made by the Court; it was on the usual petition of an equitable mortgagee by deposit of deeds.

This was a petition praying for a rehearing, and to have the order varied. The present petition stated that the petitioner was equitable mortgagee by deposit of title deeds; that the premises were an insufficient security; and that the fiat issued on the 29th of July 1834,



on the petition of the present petitioner. Shortly before the fiat issued the bankrupt absconded, whereon the petitioner took measures for taking possession of the mortgaged premises, and took actual possession the same day the fiat issued, through *Butcher* his agent. The mortgaged premises lay near to other premises of the bankrupt not mortgaged, and *Butcher*, with consent of the solicitor to the fiat, was also put into possession of those other premises on behalf of the creditors generally; and after the choice of assignees they resolved that *Butcher* should continue to manage the cropping, &c. of the premises not in mortgage. *Butcher* used the same utensils and labourers on all the premises indiscriminately, on an agreement that he should finally account, when the petitioner, as equitable mortgagee, was to be charged a sum for his portion of the expenses of cultivating all the lands; the crops of the mortgaged premises were kept separate. This petition stated that it had been arranged, under these circumstances, that the prayer of the former petition should be consented to, but that not having been done by mistake, but having been opposed, and the special facts now set out not having been inserted in the petition, the order was made as mentioned. (a)

The petition prayed that the petitioner might be declared entitled to the rents, crops, &c. from the time *Butcher* took possession.

Mr. *Swanston* and Mr. O. *Anderdon* for the petition :  
— Whether the possession were before or after the act of bankruptcy is immaterial, if he had a right to enter under the contract; indeed, bankruptcy would give a right to a receiver. At law even an equitable mort-

1835.

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*Ex parte*  
BIGNOLD.  
In the matter  
of  
POSTLE.

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(a) *Ante*, page 16.



1835.

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*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 POSTLE.

gatee has a right to enter on the premises. *Garry v. Sharratt*. (a) [The CHIEF JUDGE:—Does not Lord *Tenterden* then appear to think that the deposit of the title deeds was sufficient to entitle them to receive the rents?] In legal mortgages the delivery of the declaration in ejectment is the time from which the mortgagee is entitled to all his rights. *Sumpner v. Cooper* (b) shows that though a deed be not registered pursuant to the 7th Ann. c. 20, yet a subsequent registered mortgagee could not take the rents received, &c. out of the hands of the first. The Court put the right to receive the rents on an implied authority.

Mr. *Walker* for the assignees:—*Garry v. Sharratt* (a) turns on the fact of a special authority to enter, without which an equitable mortgagee so doing would be a mere trespasser. The petitioner took possession in his character of petitioning creditor.

The CHIEF JUDGE:—The Court are of opinion that the petitioner is entitled to receive the rents and crops received by *Butcher*. By the deposit of the deeds the petitioner became entitled to the same beneficial interest as if a legal mortgage had been actually executed; if he had not taken possession, but came to the Court for the usual order for sale, &c., then the rents before the date of the order would belong to the assignees, who could not be called on to account to the equitable mortgagee before the order. The petitioner took possession, not in his character of petitioning creditor, but as mortgagee only; when the assignees were chosen the arrangement showed their concurrence in his taking possession as equitable mortgagee; for though

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(a) 10 *Barn. & Cres.* 716.

(b) 2 *Barn. & Adol.* 223.



it was agreed that the utensils should be used in common, yet a distinct account was to be kept, and an allowance paid for their use on the mortgaged farm. Then, was there any implied authority before he took possession? *Garry v. Sharratt* (a) was a question of fact; so is this, viz. whether there were such authority. The petitioner had authority from the bankrupt, and the assignees assented thereto; he received the rents, &c. as mortgagee, and the assignees have no right to call on him for an account, except to diminish the amount of debt provable.

1835.

*Ex parte*  
BIGNOLD.  
In the matter  
of  
POSTLE.

*Sir John Cross*: — Even if the mortgagee had been a trespasser before the choice of assignees, yet their acquiescing in his possession made it lawful from that day.

*Sir George Rose*: — I concur in the order. I cannot say that the mere deposit, without more, gives authority to receive the rents; *Garry v. Sharratt* (b) does not establish that. In this case the deposit alone would not indicate an intent to give authority to receive the rents, &c. from the time of deposit. I apprehend that when the mortgagor absconded, the petitioner might have had a receiver; so he might on bankruptcy, stating that the security was insufficient. The petitioner, however, acted for himself, and entered, and the assignees acquiesced therein. Now, when parties have themselves done what the Court would have done for them, that is, have done what was tantamount to the appointment of a receiver, the Court will not interfere to undo such acts.

The order declared the petitioner entitled to the rents, &c. since *Butcher* was in possession.

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(a) 10 *Barn. & Cres.* 716.

(b) 10 *Barn. & Cres.* 710.



C. of R.  
April 25,  
1835.

The quorum  
commissioners  
named in a fiat  
are entitled to  
be summoned.

If not sum-  
moned the  
Court of Re-  
view will inter-  
fere

*Ex parte* DOUGLAS. — In the matter of ELLIS.

THE petitioner was a commissioner appointed under 1 & 2 W. 2, c. 56, s. 14, for the district including Portsmouth, Winchester, and Basingstoke. The petitioner and another barrister were of the quorum; the three other commissioners were attorneys. A fiat issued directed to all five commissioners as usual; but the petitioner, though of the quorum, was not summoned; but seeing notice in the London Gazette of the three public meetings, he voluntarily attended at the first, took the oath, and expressed his wish, &c. to attend. The solicitor, however, informed him he could not be summoned, as the creditors objected to the additional expense. This was a petition praying that the petitioner might be summoned regularly, and that the solicitor might pay all fees which the petitioner would have received if regularly summoned, and the costs of the petition.

The affidavit of the solicitor denied notice of the wish of the petitioner to attend, and stated that he acted by desire of the creditors, who preferred the other commissioners, and objected to the additional expense, and that he did not exclude the petitioner, but left him to act as he thought proper.

Mr. *Moultrie* for the petition stated the facts as above, and cited 6 Geo. 4, c. 16, s. 23, and *re Kilsby*, 3 Dea. & Ch. 19.

Mr. *Goodeve* for the solicitor: —

The jurisdiction of this Court is confined to the administration of the bankrupt's estate, except where extended by statute. This is an application by one having no interest in the estate. Had the bankrupt



or the creditors come forward it might have been different.

1835.

In *ex parte Ward* (a) a commission had been improperly directed to attorneys; a barrister petitioned to have his name inserted, but both the Vice-Chancellor and the Lord Chancellor held he had no right to petition, though the creditors might.

*Ex parte*  
DOUGLAS.  
In the matter  
of  
ELLIS.

THE CHIEF JUDGE: — That was an application by one of a class eligible; this petition is by an individual elected and named in the fiat, and clearly entitled under the 23d section of 6 Geo. 4, c. 11, to be summoned.

Sir John Cross concurred.

(a) *Ex parte Ward*, Lord Chancellor, August 1832. By Lord Loughborough's order of the 12th August 1800, the names of two barristers, resident in or near the place where the commission is to be executed, are to be inserted in every commission. A commission was directed to three solicitors and two barristers in Oxford accordingly. This was a petition by Mr. Ward, a barrister residing in Oxford, stating that one of the quorum barristers did not reside within the usual limits, and was out of practice, and would not attend, and that the insertion of his name was therefore a mere evasion of the order; that the petitioner was willing to act; he therefore prayed that his name might be inserted in the commission. The petition was heard

before the Vice-Chancellor, who dismissed it with costs. This was an appeal.

Mr. Montagu for the petitioner.

Mr. Jacob for the assignees, *contra*.

LORD CHANCELLOR:—The decision of the Vice-Chancellor must be confirmed. The petitioner has no *locus standi* to complain; the creditors are the only persons to petition. Nothing appears, or is implied, impeaching the motives or character of the petitioner. It is but fair and just, therefore, to presume that he is actuated by public spirit in this proceeding; but as costs are incurred to the bankrupt's estate by this petition, which in point of law is improperly presented, this petition of appeal must be dismissed with costs.

A barrister cannot petition to have his name inserted in a commission.



1835.

*Ex parte*  
DOUGLAS.  
In the matter  
of  
ELLIS.

Sir *George Rose* : — The order is only directory, and not imperative, as to two barristers being summoned ; so that the Court are not compelled to interfere. Still it is our duty to see that fiats are worked in pursuance of the statute and general orders.

The Court intimated that the order, in strictness, should be to “ declare every thing void which had been done when the petitioner was not present ;” but the petitioner consented that the previous proceedings should stand good, on his being paid his fees, as if he had attended, and on his being summoned in future, and the costs of the petitioner paid ; and so it was ordered on consent.

C. of R.  
April 28,  
1835.

In cases of scandal, the costs are as between solicitor and client.

*Ex parte* PORTER.—In the matter of ROBINSON.

MR. *WHITMARSH*, junior, stated that a reference had been made to the registrar for scandal, who reported that the matter was scandalous. This was an application to confirm the report, with costs as between solicitor and client ; which, on the authority of *ex parte Simpson* (a) was ordered.

C. of R.  
April 30,  
1835.

If bills of third persons are indorsed to and deposited by the bankrupt with a creditor as collateral security for a debt, and afterwards paid by such third persons, their value must be deducted from the proof.

*Ex parte* BRUNSKILL.—In the matter of BENTLEY and Co.

THIS was a petition for payment of a dividend, and a cross-petition to expunge and reduce the proof. (b)

The petitioner advanced money to the bankrupt on an

(a) 15 *Ves.* 476. See *ex parte Wake, Mont. & Bl.* 259. taken and abandoned to save expense ; and, by agreement, the

(b) No cross-petition was in question was argued as if a cross-petition had been presented. fact presented ; the objection was



agreement that the latter would indorse and transfer the bills of third parties as collateral security. *Bentley* and Co. at various times so indorsed and transferred bills to the petitioners, amounting to 7,047*l.*, which included a bill of 551*l.*, discounted by the petitioners for *Bentley* and Co. At the bankruptcy 4,468*l.* was due to the petitioners, which they proved, exhibiting the bills so indorsed to them as being the securities held by them. After the proof the bill for 551*l.* was paid, and also several of the other bills so indorsed and deposited were paid by the parties thereto to an amount of 945*l.*

A dividend was declared, which the official assignee refused to pay, unless 945*l.*, the amount of the bills so paid, was deducted: this was a petition for payment of the dividend, deducting only the amount of the bill for 551*l.*, which the petitioner was willing to deduct.

Mr. *Swanston* and Mr. *Bacon* for the petition:—  
The petitioner is entitled to receive dividends, and also to get what he can from other sources till paid 20*s.* in the pound. The petitioner relies upon *ex parte Sammon* (b), where it was decided, that if bills for 1,320*l.* are delivered by the drawer to a creditor as collateral security for 4,000*l.*, and both drawer and acceptor become bankrupt, but the acceptor pay 20*s.* in the pound; the creditor may receive 20*s.* in the pound on the 1,320*l.* from the acceptor, and prove the remainder of the 4,000*l.* against the drawer.

Mr. *Bethell* and Mr. *Sturgeon* for the assignees:—  
By one of the orders of this Court (a) bills held by creditors must be produced when application is made for

1835.

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*Ex parte*  
BRUNSKILL.  
In the matter  
of  
BENTLEY  
and others.

(a) 28th March 1832.

(b) 1 D. & C. 564.



1835.

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*Ex parte*  
 BRUNSKILL.  
 In the matter  
 of  
 BRNTLEY  
 and others.

the dividend, but several of these bills are paid to third parties, and delivered up to them and cannot be produced. The general rule of law and uniform practice, and on which the petitioner relies, is, that when a creditor who proves exhibits bills held as security for his debt, and any of them are afterwards paid, the amount paid must be deducted from the proof; *ex parte Bloxham (a)*, *ex parte Wallace (a)*, *ex parte Barratt (b)*, and *ex parte Burn. (c)*

Mr. *Swanston* in reply:— The general order cited applies when the proof is made upon the bills; here the proof was for goods sold, and the bills were merely mentioned as collateral security. It is clear that the old cases cited, and the rule as stated by *Cooke*, appear in favour of the assignees, but they are totally at variance with the present practice, and are never now acted upon. *Ex parte Barratt (d)* was not a case of a bill deposited as collateral security, but a case of discount of a bill; and here the petitioner consents to expunge the debt to the amount of 551*l.*, for which he discounted a bill since paid. In *ex parte Barratt (b)* the counsel against the petition argued as is now argued, and the Vice-Chancellor, instead of citing the cases now relied on by the other side, gives quite a different reason for his judgment, which he would not have done if the mere general rule had in his judgment been conclusive.

The CHIEF JUDGE:— This case was by agreement heard and decided as if a cross-petition to expunge had been presented. It appears to me that the Court are bound by a long course of practice, founded upon the authorities cited, to decide in favour of the assignees.

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(a) *Cooke*, B. L. 167.

(c) 2 *Rose*, 55.

(b) 1 *Gl. & J.* 527.



If these bills had not been indorsed by the bankrupt, but deposited by him as a pledge or security, then, if the petitioner proved, he must have given them up, or have had them sold and their value deducted from the proof; and I do not perceive how the indorsement can alter that, and enable the petitioner to prove and also retain them, and receive payment for them *aliunde*. *Ex parte Barratt* (a) does not impugn the previous cases; the proof must be diminished by the amount of the bills paid since the proof.

Sir *John Cross* and Sir *George Rose* concurred in the order.

Proof as to the bills paid to be expunged; dividend as to the residue ordered.

1835.

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*Ex parte*  
BRUNSKILL.  
In the matter  
of  
BENTLEY  
and others.

*Ex parte* LIVING. — In the matter of TOMBS.

C. of R.  
May 1,  
1835.

MR. MOORE for the petition: — This is a petition of a legal mortgagee to be allowed to bid at the sale, and to receive the rents and profits received by the assignees since the order of the commissioners made for the sale under Lord *Loughborough's* order.

If a legal mortgage is ordered to be sold by the commissioners, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenants to pay the rents to him.

Mr. *Menteath*, *contra*: — This is a legal mortgagee, who is not entitled to the rents till he makes an entry, &c., which he has not done, nor has he given any notice to the tenants. The order of sale by the commissioners gives him no such right, not being equivalent to a re-entry.

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(a) 1 Gl. & J. 329.



1835.

*Ex parte*  
LIVING.In the matter  
of  
TOMBS.

The Court having intimated an opinion against the petitioner, Mr. *Moore* said he should not press the point.

*Per Curiam* :—The order of the commissioners is not equivalent to an entry by the mortgagee, which is necessary in ordinary cases to entitle to the rents, &c. A mortgagee has already sufficient advantages over the other creditors. If no bankruptcy intervened, and there was an agreement between the parties for a sale, the mortgagee would not be entitled to the rents, &c. till after entry. In cases of equitable mortgage the party is entitled to the rents from the time of the order for sale, the reason of which is, he might have a receiver appointed the moment he asked it, and therefore the order is considered equivalent thereto. In equitable mortgages the mortgagee cannot enter; in legal mortgages he can, and must stand in his legal right.

Order as to rents, refused.

C. of R.  
May 1 & 2,  
1835.

*Ex parte* FLOWER.—In the matter of CORNIE.

Flower accepted bills to enable Cornie to make shipments to Sydney, on an agreement—known at Sydney—to apply the return proceeds in payment of the bills.

On the last shipment, Cornie sent notice to Sydney to send the proceeds direct to Flower, and gave the same notice to a partner of the Sydney house, who happened to be in London. Before the notice arrived at Sydney the return proceeds were sent off to Cornie, who became bankrupt, and his assignees received them. Held, not in his reputed ownership, and Flower entitled thereto.

THE bankrupt was in the habit of making shipments to *Marsden* and Co. at Sydney, New South Wales; on such occasions the petitioner accepted, and delivered to the bankrupt, a bill or bills for the amount of the invoice price of such goods. Previously to and as a consideration for accepting such bills, it was always agreed that the return proceeds should either be received directly



by the petitioner, or, if they came into the hands of the bankrupt, that the same should be held by him in trust for and immediately paid over to the petitioner, and that until the return proceeds arrived the bankrupt should procure the holders of the bills to renew them. *Marsden* and Co. were acquainted with these facts; and this course of dealing was clearly recognized in various letters between the bankrupt and *Marsden* and Co. The last of these shipments was on the 14th of February 1834, when the bankrupt wrote to *Marsden* and Co., with the goods, a letter desiring them to remit to the petitioner the proceeds of the sale of all goods consigned to them by the bankrupt; and at the same time a letter to the same purport was sent to *Marsden's* partner, who happened to be in London. The bills in question were remitted by *Marsden* and Co. from Sydney to the bankrupt, before the receipt of this letter by them, and came to the bankrupt in November 1834, after the act of bankruptcy, the fiat having issued in June 1834.

1835.

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*Ex parte*  
FLOWER.  
In the matter  
of  
CORNIE.

Mr. *Swanston* and Mr. *Dixon*, for the petition, cited *ex parte Copeland* (a) and *ex parte Precott*. (b)

Mr. *Montagu* for *Marsden* and Co.

Mr. *Campbell*, for the assignees, contended, that the proceeds were in the order and disposition of the bankrupt; that there was no evidence that the Sydney house knew the course of dealing, or sent any cash to the bankrupt before the bankruptcy; that the letter of the 14th of February 1834 might have been a good equitable assignment if notice had been given, but no notice arrived at Sydney till long after; that the other letter

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(a) 3 *Dea. & Ch.* 199.

(b) 1 *Mont. & Ayr.* 316.



1835.  
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*Ex parte*  
 THOWER.  
 In the matter  
 of  
 CORNIE.

was to a partner in London, while the goods were at Sydney, to which place the notice must be sent to have any validity; and that before the partners at Sydney received any notice they had remitted the proceeds to the bankrupt, which were therefore in his order and disposition.

June 2. Mr. *Swanston*, in reply, was stopped by the Court.

The CHIEF JUDGE: — The Court is of opinion that the petitioner is entitled to have the proceeds applied in reduction of the debt on the bills. The essential facts are simply these: *Cornie*, as manufacturer, consigns goods to *Marsden* and Co. for sale, and, in order to raise money, drew on the petitioner for the amount of each shipment, and the petitioner accepted bills on the express agreement that the proceeds should be liable, and that if the return proceeds had not arrived when the bills became due, that the bills should be renewed. The goods were sent to Sydney, and before the bill arrived the bankrupt sent notice to *Marsden* and Co. at Sydney to make the returns direct to the petitioner, and at the same time gave notice to one of the partners who happened to be in London. Before the notice arrived at Sydney the goods were sold there, and the produce remitted in bills to *Cornie*, and before they arrived here he became bankrupt; consequently the bills came to the hands of the assignees, who claim to retain the whole proceeds, while the petitioner claims to be entitled to be paid or indemnified thereout for the acceptance which he had paid. The reasons in his favour are, a trust, a *quasi* equitable assignment, to meet his acceptance. Notice was sent before the bankruptcy, so that every thing was done which could be done, and consequently the intervention of the bankruptcy creates no distinction,



as the remittance was clothed with a trust in favour of the petitioner; the proceeds were not in possession of the bankrupt "with consent of the true owner thereof," the petitioner (as equitable mortgagee) being the true owner.

1835.

*Ex parte*  
FLOWER.  
In the matter  
of  
CORNIE.

*Sir John Cross* :—Long prior to the letter of February 1834 a course of dealing existed which alone would have entitled the petitioner to the proceeds of the bills, viz. that the bankrupt should receive the proceeds, and hand them over to the petitioner. The letter produced this change, that the proceeds were to be sent directly to the petitioner; but *Marsden* and Co. not having received the letter, the proceeds were sent to the bankrupt for the use of the petitioner. On the whole, this is not a case to which reputed ownership applies.

*Sir George Rose* concurred in the judgment.

The return proceeds in question ordered to be paid to petitioner, each party paying his own costs.

*Ex parte* COURTENAY.—In the matter of DAVIS.

ONE of two executors became bankrupt, with money of the testator's estate in his hands. This was the petition of the other executor for leave to prove.

C. of R.  
May 5,  
1835.

Where one of two executors becomes bankrupt, the solvent executor may prove against the bankrupt's estate without an order.

*Mr. Swanston* and *Mr. Stinton*, for the petitioner, cited *ex parte Brown*. (a)

(a) 1 *Dea. & Ch.* 119.



1835.

Mr. *Ash* for the assignees.

*Ex parte*  
COURTENAY.  
In the matter  
of  
DAVIS.

*Per Curiam* : — There was not any necessity for a petition, but, as it is presented, you may take the order at your own cost.

C. of R.  
May 5,  
1835.

*Ex parte* YOUNG.—In the matter of PRIOR.

A testator gave 4,000*l.* in trust for his married daughter for life, then to her husband for life, and then for the children. The husband owed the testator 6,000*l.* on bond; the testator directed that, if not paid off in his lifetime, it should be taken in satisfaction of the 4,000*l.* 950*l.* was paid on the bond, and invested in stock; the husband became bankrupt, and the executor proved the remaining bond debt, and invested the dividends in stock: the wife died. Held, the interest of the stocks was to accumulate till the 4,000*l.* was made good, and then the assignees to be entitled to the interest during the husband's life.—  
Sir J. Cross diss.

IN July 1823 *W. Prior* gave a bond to *Rowley* for 6,000*l.* and interest. In December 1823 *Rowley* made his will, devising his property to trustees, in trust to invest 3,500*l.*, and pay the interest and dividends to his daughter *Elizabeth Pratt*, or permit her to receive the same during her life for her separate use; and after her decease leaving her husband surviving, then on trust to pay the interest or dividends to the husband or his assigns, or otherwise to permit him to receive and enjoy the same for his own use during his life; with remainders over to children. The testator then created like trusts with respect to another sum of 3,500*l.* in favour of his daughter *Jane* and her husband, the bankrupt, and their issue. The will then contained the following proviso:—“ And whereas my son-in-law *W. Prior* stands indebted to me in the sum of 6,000*l.* for money lent and advanced to him on his bond bearing date on or about the 28th day of July 1823, conditioned for the payment of the same sum to me, my executors, administrators, or assigns, in seven years from the date thereof, with interest in the meantime at and after the rate of five per cent. per annum, by half-yearly payments: Now my will is, and I do hereby declare and direct, that if the said principal sums so due from the said *W. Prior*, and the interest thereof, shall not be paid off or discharged in my lifetime, the same sums and interest, or such parts thereof as shall remain due and unpaid on the said bond, shall be



accounted for and go or be taken, in part or in the whole, so far as the same will extend, in redemption and satisfaction as well of the said legacies of 1,000*l.* herein-before given and bequeathed to my said last-named sons-in-law respectively, as also the several sums of 3,500*l.* herein-before bequeathed to or in trust for my said daughters *Jane Prior* and *H. Cooke*, and their respective issues, and of such further or other sums or provisions as by the survivorship or otherwise they may become entitled to under this my will, in proportion and according to the sums which may at the time of my decease be or become due to my said executors for principal and interest on the said bond respectively; it being my desire and intention that the direction herein-contained shall not exonerate my said sons-in-law *W. Prior* and *W. Cooke* from their liability to pay and discharge to my said trustees or executors the whole of the said sums of 6,000*l.* and 2,563*l.*, and the interest thereon, when and as the same shall respectively become due, according to the purport and effect of the said bonds or obligations, and the conditions of the same respectively; and that if the same several sums, and interest thereon, shall not be duly paid at the respective times and in manner in the said bonds respectively mentioned, then and in such case that my said executors and trustees shall have and pursue such lawful remedies and means for recovering the same principal sums and interest and all arrears thereof, or all such parts thereof as may from time to time remain due and unpaid, as they in their discretion shall see fit; but if the monies which may be or become due on the said bonds respectively, or any part thereof, shall be paid off and discharged in my lifetime, or be received or be recovered by my executors after my decease, then and in such case my said daughters *Jane* and *Harriott*, and their respective husbands, shall there-

1835.

—  
*Ex parte*  
YOUNG.

In the matter  
of  
PRIOR.



1835.

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*Ex parte*  
 YOUNG.

In the matter  
 of  
 PRIOR.

upon have and be entitled to their respective legacies or such part thereof respectively as shall not be so redeemed or satisfied as aforesaid, for the benefit of themselves and their children respectively, in the manner and according to the trusts and directions herein-before by me provided." By a codicil he left 500*l.* more on the same trusts.

This will was proved by *Thomas Rowley*. *William Prior* afterwards paid *Thomas Rowley* 762*l.* on account of the bond, which was appropriated to the legacy. In December 1830 a commission issued against *William Prior*. *Thomas Rowley*, as executor, proved for the balance due on the bond, and received dividends thereon, which were invested in stock by the executors. The 762*l.* was also invested in stock. *Jane Prior* died in October 1834.

This was a petition by the assignees of *William Prior*, claiming to be entitled to the interest of the stock during his (*William Prior's*) life, as well of that bought with the dividends, as that bought with the 762*l.*

Mr. *Swanston*, for the assignees, relied on the doctrine laid down in *Stratton v. Hale* (a), and contended, that *ex parte Turpin* (b) was erroneously decided, and had been since overruled in effect by *ex parte Shute* (c), and cited *ex parte Meaghan*. (d) In *ex parte Turpin* (b) it was decided that the trustees might accumulate the interest till the whole principal sum was made good, and then the interest to go to the creditors; and in *ex parte Shute* (c) it was held, that the dividends were to be accumulated only till the wife's marriage portion was made good.

Sir *John Cross* : — *Ex parte Turpin* (b), and *ex parte Shute* (c), it is said, over-rule *Stratton v. Hale* (a).

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(a) 2 Bro. C. C. 490.

(c) *Mont. & Bli.* 385. S. C.

(b) *Mont.* 443. S. C. 1 *Dea.* 5 *Dea. & Ch.* 1.

& *Ch.* 120.

(d) 1 *Sch. & Lef.* 179.



Sir *George Rose* : — To my personal knowledge, Lord *Eldon* did not recognize *Stratton v. Hale* (a) ; he thought that there was some mistake, or that no such decision could have been made.

1835.

—  
*Ex parte*  
*Young.*

In the matter  
of  
Prior.

Mr. *Bethell*, *contrà*, for the trustees : —

A trader cannot introduce into a settlement a clause, that on his bankruptcy the property shall go to another.

In a case in which I was counsel a few days ago certain trustees were parties to a breach of trust, and lost part of the funds ; the tenant for life was privy thereto ; and the Court held he could not claim. (b)

*Curia advisare vult.*

Judgment was subsequently delivered as follows :

Sir *John Cross* : —

This bankrupt was indebted on a bond to certain trustees in a large sum, which was to be placed out at interest in trust for his wife for life, then for himself for life, and then for the issue of the marriage. He had paid part of the debt before his bankruptcy, and the trustees have since proved for the residue, and received dividends in respect thereof, which have been invested in government securities, pursuant to the trusts. The wife being dead, the question is, whether the interest of the dividends is to be retained by the trustees during the life of the bankrupt until the whole debt be made good, or whether it is to be received by the assignees for the benefit of the general creditors. If this were a new question I am not sure on which side my judgment would preponderate. The principle on which it mainly depends has been frequently discussed and determined in cases where the bankrupt's wife was a party, and her marriage portion

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(a) 2 Bro. C. C. 490.

(b) See *Nail v. Painter*, 5 Sim. 555.



1835.

*Ex parte*  
YOUNG.In the matter  
of  
PRIOR.

the matter in dispute; and the peculiarity of the present case is, that the wife is no party, nor is the subject matter her portion.

The earliest case to be found on this subject is *ex parte Smith re Osman* (a), which was decided by Lord *Hardwicke* about a century ago. In that case a bankrupt, in consideration of his wife's portion, gave a judgment to trustees for a sum, in trust for himself for life, and then to his wife, with remainder over. The Lord Chancellor ordered the interest of the dividends during the life of the bankrupt to be paid to the assignees for the benefit of the creditors. Again, in a few years afterwards, in *Groom's case* (b), Lord *Hardwicke* stated it as a general rule, that "if a husband becomes a bankrupt after breach of payment to trustees, they have always been admitted creditors upon equitable terms, and the Court has taken care that the interest of the money shall be paid to the creditors under the commission during the life of the husband, and the principal secured to the wife in case she survives the husband." Lord *Thurlow* adopted the same rule; and in *Mitford's case* (c) he allowed the trustees to retain the interest on government securities which belonged to the wife before the marriage: but, on the other hand, he ordered that the assignees should take the interest on the dividends derived from the bankrupt's estate during his life, in respect of trust money lent him in which he had a life interest. And again, in *Stratton v. Hale* (d), which was the case of a bill in equity filed by assignees against trustees of a fund in which the bankrupt had a life estate, and which had been, as in the former case, lent to the

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(a) *Cooke*, B. L., 224, edit. of 1817.

(b) 1 *Atk.* 115.

(c) 1 *Bro. C. C.* 399. See the order more fully in *Priddy v. Rose*, 3 *Merr.* 105.

*Bro. C. C.* 490



bankrupt, and proved as a debt under his commission, and dividends paid thereon, the assignees sought to recover the interest on the dividends during the life of the bankrupt. The trustees contended for the right now claimed, to retain the dividends to make good the deficiency on the debt; but that was not allowed, and the interest was decreed to be paid to the assignees. That case appears to have been well considered by Lord *Thurlow*, and was argued by the Attorney General for the creditors, and by Lord *Eldon*, then Solicitor General, for the trustees; and against that decree we do not find there was any appeal. This was the last reported case prior to the change of jurisdiction introduced by the 1 & 2 W. 4, c. 56. Debts of this description, being generally of the class of contingent debts, were rarely proveable at all, till the late act, 6 Geo. 4, c. 16., provided for the admission of contingent debts. Soon after this Court came into operation, *Turpin's* case (a) revived the question, which I own I till then thought was quite at rest, after the decisions I have referred to, ingrafted as they had long been into every text book on this branch of the law. But we were told (in *Turpin's* case), much to my surprise, that Lord *Eldon* had long been in the habit of deciding contrary to that case, insomuch that the new doctrine was well known to all the practitioners in his Court. This appeared very remarkable, for the case was one of too rare occurrence to have become a matter of habitual practice. Besides, there were several learned reporters at the Chancery bar during all Lord *Eldon's* time, who regularly published the valuable decisions of that reverend judge; and they are, one and all, silent on this subject. It was the same with all the contemporary

1835.

*Ex parte*  
YOUNG.

In the matter  
of  
PRIOR.

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(a) 1 Dea. & Ch. 120.



1835.

—  
*Ex parte*  
 YOUNG.

In the matter  
 of  
 PRIOR.

text writers. One of these, Mr. *Cook*, who during nearly the whole time practised extensively before Lord *Eldon* in this branch of the law, and whose book was the chief oracle of the profession for such matters, published no less than eight editions of his book without any allusion to this new doctrine. On the contrary, he has in every one of them reported the first case before Lord *Hardwicke* as the existing rule, and referred to the other cases as confirming it. However, upon searching Lord *Eldon's* manuscript order books, one unpublished case was found, in which, twenty years ago, trustees were allowed, in favour of the wife, to retain the bankrupt's annuity, in compensation for the deficiency in the trust funds. Whether that case was contested does not appear; but, with no other precedent, the majority of the judges here adopted the new doctrine, and over-ruled the decisions of the former Chancellors.

The next and last was *Shute's* case (*a*). There a part only of the trust fund was the wife's marriage portion, and the rest was not; and the majority of the judges here therefrom adjudged, that, in respect of the wife's portion, the trustees should appropriate an adequate part of the bankrupt's annuity to make good the deficiency; but as to the rest, that it should go to the general creditors, and thereby, as it appears to me, established a clear distinction, and expressly confined the new doctrine to the wife's property. Now in the present case no part of the trust fund was the wife's marriage portion, nor is there any interest of hers to be protected, she having died before the question arose. It appears therefore to me, that to allow these trustees to retain the bankrupt's annuity from the general creditors is to extend the new doctrine beyond any former

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(*a*) *Mont. & Bli.* 385. S. C. 3 *Dea. & Ch.* 1.



case, and thus to be directly at variance with the last determination of this Court. Under these impressions I feel it to be my duty, however reluctantly, to dissent from the present opinion of my learned brethren, which I should do with more distrust of my own judgment if I were not sanctioned by Lord *Hardwicke* and Lord *Thurlow*, and by the acquiescence of the profession for nearly a whole century, as well as by the last decision of this Court.

My opinion upon the present case is, that the annuity ought to be forthwith sold for the equal benefit of all the creditors, among whom the trustees will be entitled to a due share, to be applied in augmentation of the trust fund.

The CHIEF JUDGE :—

As I have the misfortune to differ from my learned colleague, I think it right to add my reasons for adhering to the opinion I expressed at the close of the argument on a former day, viz. that the assignees are not entitled to the relief they pray. Their prayer in substance is, that they may be declared entitled, as assignees of the estate and effects of *William Prior*, to receive during his life, for the benefit of his creditors, the interest and dividends of 1,168*l.* bank annuities, purchased by one *Thomas Rowley*, the executor of another *Thomas Rowley* deceased. It appeared by the affidavits that *William Prior*, the bankrupt, married the daughter of the deceased *Thomas Rowley*, who by his will, after leaving the bankrupt a legacy of 1,000*l.*, desired his executors to invest the sum of 3,500*l.*, and to pay the dividends to his daughter *Jane*, the wife of the bankrupt, for her life, and upon her death in the lifetime of her husband to pay the interest or dividends to the bankrupt for his life, and after his death to

1835.

*Ex parte*  
YOUNG.

In the matter  
of  
PRIOR.



1835.

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*Ex parte*  
YOUNG.In the matter  
of  
PRIOR.

stand possessed of the principal sum of 3,500*l.*, and of securities in which the same might be invested, for the use of the children of the marriage. He afterwards, by a codicil, directed the further sum of 500*l.* to be laid out in a like manner for the same purposes; thus increasing the bequest to 4,000*l.* The testator died in 1826. In 1830 *Prior* became bankrupt, and in 1834 his wife died. If these had been all the facts of the case, the right of the assignees to receive, during the bankrupt's life, the dividends of the trust fund in the hands of the trustees, would have been indisputable, and the only question would have been — though this would not have been the Court to decide it — what was the amount of assets in the hands of the executor applicable to the bequest in question. But it appears that the bankrupt, at the time of the execution of the will and of the testator's death, was indebted to the testator in the sum of 6,000*l.*, secured by his bond payable in July 1830; and the testator by his will, after reciting the existence of this debt so secured, declared and directed, that if the principal sum and interest should not be paid in his lifetime the same should be accounted for and go and be taken, in part or in the whole, in redemption and satisfaction, as well of the said legacy of 1,000*l.* given to the bankrupt, as also of the legacy bequeathed in trust for his daughter *Jane Prior* and their children, thereby clearly intimating his will, that the trustees should not be called upon to invest any part of the 4,000*l.* for the purposes of the trust so long as a debt to that amount remained due upon the bankrupt's bond. When, therefore, in 1830, the money secured by the bond became due, the bankrupt, after deducting 1,000*l.* for his own legacy, would remain indebted to the executor in 3,500*l.* It appears that the bankrupt had before his bankruptcy paid the



executors 762*l.*, leaving a balance, for principal and interest, of 4,243*l.* In this state of things, neither the wife, if living, nor the bankrupt, if solvent, could have called on the trustees for any payment under the bequest of the 4,000*l.*; for, by the express direction of the will, the balance due was to be taken in redemption and satisfaction of that legacy. The executors, however, being authorized by the will to pursue all lawful remedies for the recovery of the whole or such part of the debt as they in their discretion should see fit, upon the issuing of the fiat tendered a proof and were admitted creditors for the balance of 4,243*l.*, and have received dividends upon that proof to the amount of 402*l.*, reducing the balance due from the bankrupt on his bond to 3,841*l.*, which, being deducted from the 4,000*l.*, the amount of the legacy, would become 158*l.*, the sum to be accounted for by the trustees as money in their hands in respect of that legacy; and the interest arising from this sum of 158*l.* is the only amount which the bankrupt or his assignees could be entitled to claim from the trustees in respect of that bequest, if the objection discussed upon the argument, and decided in the case of *ex parte Turpin* (a), had not been interposed. Trifling, however, as is the amount really in issue, still, as there is something to raise this question upon, it becomes the duty of the Court to decide it. Upon the argument the counsel for the assignees rested their claims upon the doctrine laid down in the case of *Stratton v. Hale* (b), and contended that the case of *ex parte Turpin* (a) was erroneously decided, and had been in effect since over-ruled in *ex parte Shute*. (c) And although, at the close of

1835.

*Ex parte*  
YOUNG.  
In the matter  
of  
PRIOR.

(a) *Mont.* 443. S. C. 1 *Dea.* & *Ch.* 120. (b) 2 *Bro. C. C.* 490.

(c) *Mont. & Bli.* 385. S. C. 3 *Dea.* & *Ch.* 1.



1835.

—  
*Ex parte*  
 YOUNG.

In the matter  
 of  
 PRIOR.

the argument in the present case, my opinion in *ex parte Turpin* (a) remained unshaken, yet, in deference to the wish of my learned colleague on my right (b), and in the hope that we might all eventually come to the same conclusion, the judgment of the Court was deferred, unfortunately without the desired result ; for his Honor Sir John Cross is still compelled to withhold his assent to the opinion already expressed by the rest of the Court. After the most careful revision of our judgment in *ex parte Turpin* (a), and of the different authorities bearing upon the question, I am satisfied that our decision was right, and that the case of *Stratton v. Hale* (c) would not now receive the sanction of any Court in Westminster Hall. The debt in *ex parte Smith re Osman* (d) was one that could only be proved under the provision of the 7 G. 1, c. 21, as *debitum in presenti solvendum in futuro*, upon which, therefore, there ought to have been a deduction in respect of the time then to run ; but the Court, instead of reducing the proof then on the proceedings for the whole sum, directed the interest on the dividends to be paid by the assignees during the bankrupt's life ; for there was no debt payable to the trustees till his death, or the death of the wife ; thus working out the relief to which the creditors were entitled by different means. And the decision in *ex parte Mitford* (e) only declared, that, according to the provisions of the same statute, there must in that case be a rebate of the interest, and that the assignees would have a right to retain whatever the bankrupt could claim against the trustees, a right which has never been

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(a) *Mont.* 443. S. C. 1 *Dea. & Ch.* 120.

(b) Sir J. Cross.

(c) 3 *Bro. C. C.* 430.

(d) *Cooke*, B. L., 224, edit. 1817

(e) 1 *Bro. C. C.* 398.



disputed; and the order which is set out in *Priddy v. Rose* (a) appears to me to be opposed to the principle contended for by the present assignees; and that it was so, in the opinion of Sir *W. Grant*, I think obvious, from his language in *Priddy v. Rose* (a), which was quoted in the argument of *ex parte Turpin* (b), and which fully supports the decision of that case. Sir *W. Grant* says, "See how the case would have stood between the trustees and *Hunt* himself. I apprehend it to be clear that he could not have claimed a benefit himself under the settlement without making good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their cestuique trust, but they might at any time after the 4,000*l.* became due have stopped the dividends if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord *Thurlow* in *ex parte Mitford*" (c); and then he read the order in *ex parte Mitford* (c) in support of that position, by which it appeared, that though the interest of the dividends under the proof, which would be of very small amount, was directed to be paid to the assignees during the bankrupt's life, the trustees were directed to retain an annuity of 24*l.* upon the joint lives of the bankrupt and his wife, and the interest of 2,704*l.* bank annuities, which otherwise would have been payable to the bankrupt for his life, towards the discharge of the principal sum due from the bankrupt. So that in effect the equity of the trustees to retain the interest for accumulation, as against the assignees, contrary to the authority of *Stratton v. Hale* (d), has been recognized by Lord

1835.

*Ex parte*  
YOUNG.  
In the matter  
of  
PRIOR.

(a) 3 *Merr.* 135.

(b) *Mont.* 443. S. C. 1 *Dea. & Ch.* 120.

(c) 1 *Bro. C. C.* 399.

(d) 3 *Bro. C. C.* 450.



1835.

—  
*Ex parte*  
 YOUNG.  
 In the matter  
 of  
 PRIOR.

*Thurlow* himself in *ex parte Mitford* (a), by Sir *William Grant* in *Priddy v. Rose* (b); it was afterwards acted upon by Lord *Eldon* in *ex parte Le Maister, re Ramsay* (c), and by this Court in *ex parte Turpin* (d); and it does not appear to me that the case of *ex parte Shute* (e), so much relied upon in the argument, is at all opposed to the decision of *ex parte Turpin*. (d)

The case of *ex parte Shute* (e) turned upon its own peculiar circumstances: a bond had been prepared for the purpose of defeating the fair operation of the bankrupt laws, and the commissioners, having no power to protect the creditor by any restraint upon the dividend, rejected the proof altogether. The wife applied for the interposition of this Court, which was called upon, not to administer the ordinary equities arising out of a case of simple default by the bankrupt, but to defeat a fraudulent contrivance, without depriving the wife of the protection to which she was fairly entitled. The claim to have the principal money secured by the bond, proved as a debt against the husband's estate, was not disputed by the assignees; but it was contended that the stipulation for payment of the interest of the fund to the wife, in the event of the husband's bankruptcy, was fraudulent and void; to this the Court agreed, as to the greater part of the claim, but to the extent of the wife's own fortune the Court thought, upon the authority of *ex parte Meaghan* (f) and other cases, that the wife was entitled to the benefit of that stipulation. If we had intended to have revoked that opinion expressed in *ex parte Turpin* (d), and to recur to the opinion adopted in

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(a) 1 *Bro. C. C.* 399.

(b) 3 *Merr.* 135.

(c) 1 *Mont.* 452 (note).

(d) *Mont.* 443. S. C. 1 *Dea. & Ch.* 120.

(e) *Mont. & Bli.* 385. S. C. 3 *Dea. & Ch.* 1.

(f) 1 *Sch. & Lef.* 179.



*Stratton v. Hale* (a), the order would have been for the separate investment of the dividends paid in respect of the wife's fortune, and for the payment of the interest upon that investment to her, and of the interest of the remainder of the dividends to the assignee for the bankrupt's life; while, on the other hand, if the Court had allowed the interest on the whole of the dividends to be paid to the wife directly or indirectly, by way of accumulation, it would have given effect, in a great measure, to the very fraud it was its duty to defeat. By the adoption of a middle course therefore, namely, by giving to the wife the interest upon her own fortune at once, and the remaining interest to the assignees during the bankrupt's life, the principle of the decision in *ex parte Turpin* (b) was not lost sight of, while it was in some degree modified, as in the case of *ex parte Mitford* (c), to meet the peculiar circumstances of the case. But if it could have been shown that the decision in *ex parte Skute* (d) was in some degree inconsistent with the judgment in *ex parte Turpin* (b), I should now abide by that judgment; and, therefore, as in this case the whole debt arises out of a contract with the wife's father, by whom the amount of that debt has been settled in reversion upon his daughter's children, and there is no principle of public policy to interfere with the full application of the principle of that judgment to the present case, I am of opinion that the assignees are not entitled to the interest of the trust fund, until by the accumulation of that interest the whole fund of 4,000*l.* shall have been made good. When that is done the assignees will be

1835.

*Ex parte*  
YOUNG.  
In the matter  
of  
PRIOR.

(a) 3 Bro. C. C. 490.

(c) 1 Bro. C. C. 399.

(b) *Mont.* 443. S. C. 1 *Dea.*  
& *Ch.* 120.

(d) *Mont. & Bli.* 385. S. C.  
3 *Dea. & Ch.* 1.



1835.

*Ex parte*  
YOUNG.  
In the matter  
of  
PRIOR.

entitled to the interest, and they may either have an order to that effect, or have their petition dismissed.

Sir *George Rose* concurred in the order as pronounced by the Chief Judge.

The order was afterwards settled by consent of all parties.

C. of R.  
May 5,  
1835.

On a petition to annul a fiat, on consent, under 6 Geo. 4, c. 16, ss. 133, 134, the assignees must be served.

*Ex parte* RACE.— In the matter of RACE.

MR. STURGEON:— This petition is to annul a fiat, with consent of nine tenths of the creditors, a composition having taken place under the 6 Geo. 4, c. 16, ss. 133, 134.

*Per Curiam*:— The assignees have not been served; that is essential.

Petition to stand over till the assignees are served.

C. of R.  
May 6,  
1835.

If a trustee become bankrupt the Court will appoint a new trustee, without a reference, if there be an affidavit of solvency, fitness, &c.

*Ex parte* WALTON.— In the matter of TOULMINSON.

MR. DIXON stated that this was a petition for the appointment of a new trustee in place of the bankrupt, under section 79 of 6 Geo. 4, c. 16; that the petition prayed the Court to declare the appointment at once, without a reference to the Master; and that there was an affidavit of the fitness of the proposed trustee; and he cited *ex parte Inkersole*. (a)

(a) 2 Gl. & J. 230.



Mr. *Lowndes*, for the assignees, contended there should be the usual reference; *ex parte Buffery*. (a)

1835.

*Per Curiam*: — On producing an affidavit of the fitness and solvency of the new trustee, and that he has never been bankrupt or insolvent, take the order appointing the new trustee at once.

*Ex parte*  
WALTON.  
In the matter  
of  
TOULMINSON.

Mr. *Swanston* stated that as the assignees appeared and disclaimed all interest in the premises, they would not be necessary parties to the conveyance; of which opinion was the Court. (b)

*Ex parte* MARTIN.— In the matter of COWDRY.

C. of R.  
May 9,  
1835.

**T**HIS was the petition of an equitable mortgagee by deposit of deeds without a memorandum. The petitioner contended the deposit was to secure past as well as future advances; the bankrupt filed an affidavit, stating that the deposit was to secure the then present and future advances only, and not by-gone advances.

In equitable mortgages by deposit of title deeds without a memorandum, the mortgagee is not entitled to past advances, in opposition to the bankrupt's affidavit.

Mr. *Ching* for the petition.

Mr. *Moore* for the assignees.

The CHIEF JUDGE: — As the bankrupt denies that the deposit was to secure prior advances, the petitioner must clearly prove the contrary before we can decide in his favour. The undisputed fact of the deposit of the deed is itself evidence of an intent to give the depositor a lien thereon to some extent; when there is a memorandum this extent is thereby defined, when there is not, the petitioner must supply the proof as to that by

(a) 2 *Dea. & Ch.* 576.

(b) See *ante*, 214.



1835.

other means; if he be so negligent as to take no memorandum, he must suffer.

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*Ex parte*

MARTIN.

In the matter  
of

COWDRY.

Sir *John Cross* did not deliver any opinion, as he wished previously to read the affidavits.

Sir *George Rose* : — The petitioner and his witness make out, no doubt, a strong case in his favour, but the bankrupt denies the statement to be true. We do not declare the petitioner's statement to be untrue, but proceed upon this general proposition, viz. that no person is entitled to the declaration of this Court in his favour, as an equitable mortgagee, against the adverse affidavit of the bankrupt, where he has no memorandum; so that when a party takes a deposit for previous advances without a memorandum to prove that fact, he places himself at the mercy of the bankrupt. The gist of these cases is not the narrative of the parties, but the intent at the moment of the deposit. If a deposit be clearly connected with subsequent advances, it is stronger or weaker according to the circumstances; but the mere fact of a previous debt and a subsequent deposit, and then other advances, is very weak evidence that it was intended to secure the previous debt; indeed it is, by itself, rather evidence the other way.

*Per Curiam* : — The Court cannot make the declaration to the full extent asked, without a *viva voce* examination; but in order to save expense, and on consent, declare the deed deposited for the then present and future advances. Let the premises be sold, and the proceeds, after paying the then present and subsequent advances, be reserved; liberty to either party to apply. If no further application be made, dismiss so much of the petition as applies to the claim for antecedent advances. Costs by petitioners in any event.



*Ex parte* MOLINEUX.—In the matter of BRIGHT.

C. of R.  
May 9,  
1835.

**P**ART of the bankrupt's estate had been three times put up to sale, but there was not any bidder. This was a petition by the sole assignee, that he might be at liberty to bid. The petition was not served upon any person.

Where a sole assignee wishes to bid, for the benefit of the estate, he must be removed, or a quasi co-assignee appointed to protect the estate.

Mr. K. Parker for the petition.

*Per Curiam*: — Before the petitioner can bid, one of two courses must be pursued; 1st, He must be removed; or, 2d, A meeting of creditors called, and one or more persons elected (by the votes of creditors above 10*l.*), in order to be served with this petition, and defend the estate, and the petition stand over in the meanwhile.

*Ex parte* BARRINGTON the younger.—In the matter of BARRINGTON the elder.

LORDS  
COMMISSIONERS.  
May 15,  
June 6,  
July 13,  
1835.

**T**HIS was a petition of appeal from *ex parte* Sidebottom. (a)

The case had been on a former day ordered to be heard on petition instead of special case.

Mr. Swanston (with whom were Mr. J. Russell and Mr. Teed) now moved to rescind the order that the appeal should be heard on petition. The 1 & 2 W. 4, c. 56, s. 3, enacts, that “in cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct;”

The Court of Review has jurisdiction to decree specific performance of an agreement to purchase mortgaged premises, sold before the commissioners under Lord Loughborough's general order.

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*Ex parte* Sidebottom, 1 Mont. & Ayr. 655, confirmed.

(a) 1 Mont. & Ayr. 655.



1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

and in *ex parte Keys* (a) the Lord Chancellor laid down a rule that the appellant should apply *ex parte* to have the matter heard on petition, and that the respondent should subsequently move to set the order aside if improperly obtained. In this case such *ex parte* order has been obtained, and the respondent now moves to rescind the order, as this is not a case proper to be heard either on petition or special case, being a question of fact, viz. whether the party had agreed to accept the title: whereas appeals are confined by the 1 & 2 W. 4, c. 56, s. 3, to "matters of law or equity, or on the refusal or admission of evidence."

L. C. *Shadwell*: — An appeal on a matter of fact cannot be heard, whether brought here by special case or petition; but the Great Seal may order any appealable case to be heard on petition. In this particular case I think the hearing had better proceed, reserving the objection.

Mr. *Jacob* and Mr. *Bethell* for the appellant: —

This is the appeal of *Barrington* the younger from the order of the Court of Review, which decided, 1st, That it had jurisdiction; 2d, That it had the machinery to work out their order; and, 3d, That the objections to title had been waived.

There are three questions:—1st, Whether the commissioner had jurisdiction; 2d, Whether a sale under Lord *Loughborough's* general order gives jurisdiction to the Court of Review to enforce specific performance; and, 3d, Whether the petitioner had agreed to accept the title such as it might be. The commissioner had no jurisdiction to order the premises to be sold, as the equity of

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(a) 1 *Mont. & Ayr.* 233.



redemption was not vested in the bankrupt, there being the provisional assignee of the Insolvent Court, and also a second mortgagee, in one of whom the equity of redemption is vested, and therefore the sale was invalid, as neither the insolvency assignee nor the second mortgagee consented; *ex parte Jackson* (a); *ex parte Topham*. (b) *Dykes* was first mortgagee, and *Beach* second mortgagee; the order was made on the application of *Beach* alone, but the whole was put up for sale, not subject to *Dykes'* mortgage. Moreover, between *Beach* and the assignees, the title of two other persons intervened; first, that of the insolvency assignee, and second, the legal estate in fee vested in *Skirrit*, subject to the mortgage. [L. C. *Shadwell*: — The petition before the Court is silent as to any conveyance to *Skirrit*.] The commission did not over-reach the insolvency assignment, not having issued within the two months, 7 Geo. 4, c. 57, s. 13. Lord *Loughborough's* order directs the surplus to be paid to the assignees, which could not be done here, as it must be paid to the second mortgagee or to the insolvency assignee; therefore the whole substratum fails in giving jurisdiction in bankruptcy.

Again, *Beach*, the second mortgagee, alone applied, but as *Dykes* was first mortgagee as to part, how could the commissioners make any order in his absence? [L. C. *Shadwell*: — They could sell, subject to the first mortgage. Mr. *Swanston*: — Which was done.] Yes; but the commissioners ordered the money to be applied, in the first place, in payment of *Dykes*; what authority had they to do this? Lord *Loughborough's* order is merely for the convenience of proof, to enable the value to be ascertained, and even that only applies when the whole interest in the property is in the assignees and

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

(a) 5 Ves. 357.

(b) 1 Mad. 38. S. C. 2 Rose, 446.



1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

mortgagee, who concur in the sale. But the commissioners do not derive authority from the Court of Review: they are not its officers, and therefore that Court cannot invest them with any authority to sell. It is not sold under an order of Court; the mortgagee puts up the estate for sale, and the commissioners so far do not interfere; it is a sale by private contract, nothing like a judicial sale. So that, assuming that the commissioners were right, still the Court of Review has no jurisdiction to enforce specific performance of a purchase made under an order of sale by the commissioners. The Court of Review is a court to administer justice between parties coming in under the bankruptcy, but has no jurisdiction over strangers to the fiat. If that Court has jurisdiction to enforce specific performance, it must have it also to set aside the purchase when made; but it has no such jurisdiction; that can only be done by bill in equity, though, as we have actually signed an agreement for purchase, there may be something to enforce in equity or at law. Courts of equity have jurisdiction to enforce an order made touching the sale of a particular estate in the course of a suit, which may be enforced under an interlocutory order, that is, if the Master sell what is ordered to be sold; but it cannot be enforced if the Master sell something not ordered to be sold: so if the Court of Review make an order for sale, a purchase made under that order may be enforced; but that Court cannot enforce a purchase not made under the order of the Court.

If a trustee sell by order of the Court of Chancery, the purchaser is not within the summary jurisdiction to enforce specific performance. When a Court enforces specific performance, it warrants the title as against all before the Court. How can the Court of Review do this? The only authority supposed to be in favour of



the jurisdiction is *ex parte Gould* (a); but that case was decided *ex parte*, there was no argument, and the case received no consideration. *Ex parte Gould* (a) was doubted by Sir George Rose in *ex parte Lucas*. (b)

Lord *Loughborough*'s order was made before the Court of Review was in existence. [L. C. *Shadwell*:—But the 1 & 2 W. 4, c. 56, s. 2, gives the Court of Review all the authority of the Lord Chancellor.] The next objection is, that the Court of Review have not the officers necessary to work out an order for specific performance, with which the Court of Chancery is amply provided, one of the Masters of which may call for papers and deeds, and issue warrants to compel the attendance of witnesses or deeds, &c.

Then the respondents insist on the acceptance of the title: that may be by positive acts, from which no other conclusion could be drawn; but no acts here could amount to that conclusion, as the title was in agitation after the lease was granted. The other side contend that the case submitted to counsel was concerning another estate; the case itself proves the contrary, as this contract, with two others, is set out in the case; but the letter of Mr. *Earle* of the 19th of August sets the point at rest. [L. C. *Shadwell*:—Then in December 1833 the discussion was going on, with the concurrence of both sides.] The Court of Review appears to have acted principally on the authority of *Burnell v. Brown* (c); but in that case, the purchaser, by a continued course of dealing, had shewn an approval of the title; another case relied on was *Burroughs v. Oakley* (d), which shews the distinction between ordering money into Court on motion, and an absolute acceptance of title.

1835.

*Ex parte*,  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

(a) 1 Gl. & J. 231.

(b) 3 Dea. & Ch. 147.

(c) Jac. & Walk.

(d) 3 Swanst. 159.



1835. Mr. *Swanston*, Mr. *J. Russell*, and Mr. *Teed*, for the respondent: —

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

The respondent insists that this appeal cannot be entertained, being as to a matter of fact, viz. whether the objections to title had been waived. In fact, no appeal, properly so, has been yet decided otherwise than on special case; for in *ex parte Keys* (a) the Court had original jurisdiction. If this had been brought before the Court on a special case, it must have contained some such statement as this, viz. that the Court had decided on the fact that the lease was made with intent to waive the objections to title. [L. C. *Shadwell*: — Suppose a certain state of facts, from which a given inference is to be drawn, may not that be a question of law?] The judges below decided this to be a question of fact, viz. that he took possession with intent to waive all objections to title. Surely that is a fact, not matter of law. As to the jurisdiction, they now object that the commissioner had not jurisdiction to order the sale; but we alone were mortgagees of Sandbank; this petition is confined to property at Sandbank, in which *Dykes* has no interest; therefore so much of the argument of the other side as related to his interest is immaterial. But if there had been any thing in the objection, it could not have been started by a purchaser, who recognized the commissioner's authority to make the order, by bidding at the sale. [L. C. *Shadwell*: — Is that so? May not a purchaser under the decree upset the decree?] But however valid the objection, can a party insist upon it after having waived it? As to the jurisdiction of the Court of Review to enforce a sale under the order of the commissioners, it must be admitted the sale would have

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(a) 1 *Mont. & Ayr.* 233.



had a judicial character if made before the Court of Review was instituted. Is it less so since? Can the transfer of the jurisdiction from the Great Seal to the Court of Review create any difference? An act done under a general order of a court is the same as an act done under a specific order in a particular case. Lord *Loughborough's* order binds country commissioners; then surely as they are bound, all other parties who act under it are also bound. The objection of want of proper machinery is unfounded. The registrars and the deputy registrars of the Court of Review issue warrants daily; and no one has hitherto resisted such warrants. If the act gives jurisdiction, the want of machinery may be lamented, but does not take away jurisdiction. As the Court of Chancery is in the habit of referring to a Master, but might decide without, so might the Court of Review.

1835.

—  
*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

As to authorities, *ex parte Gould* (a) does not stand alone, there being two others, *ex parte Green* (b) and *ex parte Partington* (c), both cited in the note to *ex parte Gould*. (a) Mr. Teed was counsel in *ex parte Gould* (a), and pledges himself that the question of jurisdiction was agitated, and considered by Sir John Leach; and Mr. J. Russell knows that the case is printed verbatim from a note furnished by Sir John Leach himself.

Authority of  
*ex parte Gould*.

As to the observations of Sir George Rose in *ex parte Lucas* (d), they were made with a different view from that now represented. An improper application was made, and *ex parte Gould* (a) cited, whereon Sir George Rose said, "It is much easier to say that that de-

(a). 1 Gl. & J. 231.

(b) 1 Atk. 202.

(c) 1 Ball & Beatty, 209.

(d) 5 Dea. & Ch. 147.



1835. cision is wrong, than to say that this application is proper.”

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

[L. C. *Shadwell*: — The prayer in *ex parte Gould* (a) was in the alternative, viz. that *Fry* should pay; or if the Court held him not bound, then for a resale.]

There is a class of cases where the vendor sells, and before completion of the sale the vendor becomes bankrupt. In that case the vendor may come as if an equitable mortgagee, and have the estate sold; *ex parte Gyde*. (b)

As to acceptance of title, the petition of appeal does not allege or pretend that the title was not accepted. If *Skirrit* had any interest in the property, it would be over-reached by the title of the assignees under the commission.

Mr. *Jacob* in reply (c) : —

The objection as to the form of this appeal is answered by the words, “ unless the Lord Chancellor shall otherwise direct,” in the third section of 1 & 2 W. 4, c. 56. The Great Seal has “ thought fit” in this case. In *ex parte Helsby* (d), and in *ex parte Christie* (e), the appeals were on petition. In *ex parte Christie* (e) affidavits were referred to, and all read, as also the judge’s notes. [Mr. *Swanston* : — That last was a petition to supersede, under which there is original jurisdiction.] Whether or not a title has been accepted is a question mixed up of law and fact. If we have accepted the title, that does not cure the want of jurisdiction in the commissioner.

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(a) 1 *Gl. & J.* 231.

(b) 1 *Gl. & J.* 323.

(c) Mr. *Jacob*’s reply not being finished when the Court rose was

continued and concluded on the 16th June.

(d) *Mont. & Bl.* 79.

(e) *Mont. & Bl.* 329.



*Ex parte Gould* (a) is the only case that can be found directly in point. In *ex parte Partington* (b) the motion was refused. *Ex parte Green* (c) is not applicable to this case. There the purchaser refused, and was unable to complete the purchase, and the assignees applied for leave to sell again. The purchaser was not served, as he did not intend to complete the purchase. *Ex parte Gyde* (d) is a mere petition by an equitable mortgagee for the purposes of proof. The argument is not answered, that if the Court of Review have jurisdiction it must be exclusive. But the argument that the person in whom the equity of redemption is vested was not a party to the order of the commissioners has not been answered. The other side contend that the insolvency assignee was a trustee for the creditors; but he is only a trustee for all the creditors who come in under the schedule, not for any one in particular.

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

*Cur. ad. vult.*

This day judgment was delivered.

July 13.

Sir *L. Shadwell*. This was a petition of appeal presented by *William Barrington* junior, the son of the bankrupt, praying for the reversal of an order of the Court of Review, declaring that the petitioner should complete a contract into which he had entered for the purchase of mortgaged premises belonging to the bankrupt, and sold under the usual order in bankruptcy. (His Lordship stated the circumstances of the sale, and read the order appealed from, dated the 3d July 1834.) The counsel for the petitioner had contended that the commissioners of bankruptcy had no power to make

(a) 1 *Gl. & J.* 231.

(b) 1 *Ball & Beatty*, 209.

(c) 1 *Atk.* 202.

(d) 1 *Gl. & J.* 323.



1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

the order for the sale of this property, which consisted of mortgaged premises already vested in the assignees of the Insolvent Debtors Court, and that the Court of Review had no jurisdiction to make the order for the specific performance. It appeared that the bankrupt had mortgaged a piece of land at Sandbank, in Cheshire, to one *Beach*. *Beach* died, and a fiat issued against *Barrington* the elder, and his interest in the mortgaged premises was put up to sale by the order of the commissioners, according to Lord *Loughborough's* general order. The petitioner *William Barrington* attended the sale, and was declared the purchaser. He afterwards objected to perform his contract of purchase; but the Court of Review, on the petition of the assignees, made an order for specific performance. (His Lordship here read the 3d section of 1 & 2 W. 4, c. 56, prescribing the mode of appeal to this Court.) Upon the appeal here no point was made in the argument as to whether evidence had been refused below which ought to have been received, or whether evidence was there received which ought to have been refused. There being no objection raised upon that point, it occurred to myself, and to the other Lord Commissioner, that the Court of Review had full power to decide the question of specific performance on the evidence before it. There was evidence before them that *William Barrington* attended the sale, that he was declared the purchaser, and that he had accepted the title so far as to grant a new lease to *Arden*, the former tenant of the premises. The Court of Review had before it evidence to enable it to draw a conclusion. Whether they would have done better if they had decided differently is not the question before this Court. The only question here is, whether an order for specific performance can be made by the Court of Review in



bankruptcy. The order which that Court pronounced was made on the authority of *ex parte Gould* (a), decided by the late Master of the Rolls, then Vice-Chancellor, in 1822. That case is cited by Mr. *Montagu*, in his report of the present case, without any objection to the propriety of the decision. Mr. *Montagu* was also counsel in the case in the Court of Review, and he would not fail to have mentioned his objection to the case when cited, if any objection could have been made.

There being no reversal of *ex parte Gould* (a), and no appeal from it, though that was the only authority for this order, still, as Lord *Eldon* had said, the authority of even a single case, if not appealed from, ought not to be disturbed on slight grounds, we are of opinion that there is no reason to reverse the order of the Court of Review.

L. C. *Bosanquet* said he concurred in the judgment. He thought it necessary only to say there was evidence before the Court of Review of the acceptance of the title by the petitioner.

*Ex parte* BARRINGTON the younger. — In the matter of BARRINGTON the elder.

IN 1829 *Barrington* the elder took the benefit of the Insolvent Debtors Act; he owed a debt to *John Law*, whose name was inserted in the schedule, but who died before the notice required by the 7 Geo. 4, c. 16, s. 42 (b), was sent to him. He left the *Sidebottoms* his executors, who subsequently, in February 1833, issued a fiat against

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

LORDS  
COMMIS-  
SIONERS.  
May 15,  
1835.

If a trader take the benefit of the Insolvent Debtors Act, a creditor whose debt is inserted in the schedule may afterwards issue a fiat on that debt against the trader.

(a) 1 Gl. & J. 231.

(b) See the clause, *post*.



1835. *Barrington* the elder on the debt so included in the schedule. At a sale of property under the fiat *Barrington* the younger was declared a purchaser, but alleging that he was dissatisfied with the title refused to complete the purchase, whereupon a petition was presented to the Court of Review, who decreed specific performance. (a)

—  
*Ex parte*  
 BARRINGTON.  
 In the matter  
 of  
 BARRINGTON.

This was an original petition to the Great Seal by *Barrington* the younger, to supersede the fiat for want of a good petitioning creditor's debt.

Mr. *Jacob* and Mr. *Bethell* for the petition : — This is the first time the question has arisen under the new Insolvent Act. The case of *Jellis v. Mountford* (b) at first may appear to be against the appellant, it having there been decided that a creditor of an insolvent trader may, after the insolvent's discharge under the Insolvent Debtors Act, (53 Geo. 3, c. 102,) issue a commission against him, although his debt was included in the schedule. This judgment proceeded on the debt not being extinguished; and there is a case deciding that a debt barred by the certificate may nevertheless be proved under a subsequent commission, though neither an action, a suit, nor a commission of bankruptcy could be supported on that debt. The case of *Jellis v. Mountford* (b) was decided under the then Insolvent Act, the 53 Geo. 3, c. 102, which differs from the present act, the 7 Geo. 4, c. 57. The respondents may also endeavour to support their case by *Quantock v. England* (c), which decided that advantage could be taken only by

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(a) *Ex parte Sidebottom*, 1 Mont. & Ayr. 655.

(b) 4 Barn. & Ald. 256. See *Montagu's Year Book*, p. 92.

(c) 5 Burr. 228. S.C. 2 W. Bl. 702.



the bankrupt of the debt being barred by the statute of limitations. The consequences of allowing this fiat to stand would be, that the old debts from which otherwise he is discharged, would be revived and provable. Are the old creditors to have a dividend *pari passu* with the new ones? In *Barton v. Tattersall* (a) a person who had taken the benefit of the Insolvent Act, first in 1814 and then in 1820, died in 1826, leaving assets more than sufficient for payment of all the debts which he had contracted subsequent to his second insolvency; and it was held that the assets should be applied, first, in payment of those subsequent debts; secondly, of the debts under the second insolvency; and, thirdly, of the debts under the first insolvency. The present case, as decided by the Court of Review, would reverse *Barton v. Tattersall*. (a) It may be objected, that *Barrington* the younger has no interest to entitle him to petition to supersede; but he is aggrieved by having an estate forced on him, to which he insists there is no title; and any aggrieved party may petition, *ex parte Lane*. (b) Section 13 of the 7 Geo. 4, c. 57, enables a commission to be taken out within two months; does not that impliedly exclude it after that period? After the two months, the insolvency assignment is to stand good; if so, what is the fiat to touch? If there be nothing on which it may operate, it is good for nothing. *Fowler v. Coster* (c) decided that a third commission was a nullity, as there was nothing to operate upon. The language of the bond given by the petitioning creditor implies, that it is contemplated that his debt is one on which an action at law could be brought. One criterion of a good petitioning creditor's debt is, whether an action at law could

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

(a) 1 *Russ. & Mylne*, 257.

(c) 10 *Barn. & Cres.*

(b) *Mont.* 12.



1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

be maintained, as an equitable debt will not support a fiat. Section 61 of 7 Geo. 4, c. 57, takes away all right by action, suit, &c.: and besides the judgment issued against him by virtue of the act merges all securities and remedies, &c. which the creditors have. The Insolvent Act declares that all future estate is to vest in the insolvency assignees; if a fiat issues that cannot take place. If two commissions issue, and 15s. is not paid under the second, the future estate vests in the assignees under the first. [Lord Commissioner *Shadwell*:—The 7 Geo. 4, c. 57, being a subsequent act, repeals 6 Geo. 4, c. 16.] Can a person who has passed through the Insolvent Debtors Court, before 6 Geo. 4, c. 16, now nullify all that has been done? [Lord Commissioner *Shadwell*:—The 56th section of 7 Geo. 4, c. 57, only comes into operation “if it appears to the Court,” &c.; but if a fiat issues, which vests every thing in the assignees thereunder, it never will “appear to the Court” that it should act. If, after the discharge under the Insolvent Act, the insolvent bought lands, the assignee under the insolvency would have a lien thereon, and the assignees under the fiat would take subject thereto. A question might arise, whether this execution were under 6 Geo. 4, c. 16, s. 108. The 7 Geo. 4, c. 57, gives force to the judgment, besides which, being subsequent to the 6 Geo. 4, c. 16, it repeals that clause.] In *ex parte Dewdney* (a) Lord *Eldon* says, “The real meaning of the legislature in those acts, requiring the Lord Chancellor to give execution to all the creditors, was that this species of execution should be given to those creditors, who, if a commission had not issued, could by legal or equitable remedies have compelled payment.” And again his Lordship says (b), “Upon the whole, my opinion as to

(a) 15 Ves. 479.

(b) Page 498.



the general point is, that in the consideration of this statute a commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors who could, by legal action or equitable suit, have compelled payment."

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

Mr. *Stinton*, for the bankrupt, did not address the Court.

Mr. *Swanston*, Mr. *Teed*, and Mr. *J. Russell*, for the assignees: —

The first objection to this application is, that the petitioner cannot be heard to invalidate the fiat; he is purchaser of debts proved, and a purchaser of land sold under the fiat, and now applies to supersede, because he dislikes his purchase.

Can a person, not entitled to supersede, go in under the fiat, become a purchaser, and then, under cover of that character, petition to supersede?

Section 13 of 7 Geo. 4, c. 57, is conclusive in favour of the assignees: that section creates a new act of bankruptcy. If that statute intended to exclude fiats, the intent would have been declared; that it did not so intend is clear from many circumstances, especially that it refers to commissions on anterior acts of bankruptcy.

Section 61 of 7 Geo. 4, c. 57, specifies, that the insolvent is protected from any writ of fieri facias, or elegit on a judgment, &c., or any action on a new promise, &c., or on any statute or recognizance; but does not mention commissions. Now it is a rule in the construction of statutes, that when many particulars are enumerated, any not so set out are excluded.

*Jellis v. Mountford* (a) is conclusive, as no material

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(a) 4 Barn. & Ald. 256.



1835.

—  
*Ex parte*  
 BARRINGTON.  
 In the matter  
 of  
 BARRINGTON.

difference exists between the Insolvent Act then in force and the present Insolvent Act. After so many years, if *Jellis v. Mountford* were over-ruled on any over-nice refinement of distinction in words, the great land-marks of property would be rendered unstable.

As to *Fowler v. Coster* (a), and that class of cases, they are all over-ruled in *ex parte Welch* (b), where Lord Brougham decided he would not abide by them.

As to the debt being inserted in the schedule, section 42 of 7 Geo. 4, c. 57, requires notice to be given to the creditors, which was not done here. The affidavit states personal notice to *John Law*, but that was more than two months after his death; moreover, the affidavit is not signed by the supposed deponent. (c) [Commissioner *Shadwell*:—Notice is to be given as the Court shall direct, 7 Geo. 4, c. 57, s. 42. Is there any general rule of the Insolvent Debtors' Court requiring an affidavit?] There is. Creditors are, by a general rule of Court, to have notice of the service of the order.

If this were an action against the bankrupt by the petitioning creditor, and the bankrupt moved for his discharge, he could not prove the service of the order, which is his protection.

Mr. *Jacob*, in reply: — One objection is, that the petitioner has no interest to enable him to supersede. But an order has been made against him for specific performance of an agreement to purchase under a fiat which is invalid, that gives him a *locus standi*. I admit the respondent had no notice, but that is a question for the Insolvent Debtors Court, who may if they please revoke the discharge on that account. It is not competent thus to take such an objection in another Court. Suppose,

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(a) 10 *Barn. & Cres.* 427. (b) *Mont.* 276. (c) It so appeared.



on an order of the Court of Chancery being cited, it was objected that the adverse clerk in Court had not been served with a subpoena to hear judgment, for that there was no affidavit thereof, would that nullify the judgment? No; it must be regularly set aside.

1835.

—  
*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

Lord Commissioner *Shadwell*: — Here a party swears he never had notice, want of which renders all nugatory. As to section 13 of 7 Geo. 4, c. 57, if a fiat do not issue within a month it never can.

*Cur. ad. vult.*

Lord Commissioner *Shadwell*: —

The question is, whether this fiat be good, the petitioning creditor being inserted in the schedule under the Insolvent Debtor's Court. It is insisted that his name and debt being therein, the debt is gone and destroyed for all purposes.

On looking into the act, the first thing that strikes is, that the legislature has not in positive terms declared the debt extinct for all purposes, nor that no fiat should issue, on the contrary the 13th and 14th sections of 7 Geo. 4, c. 57, expressly contemplate issuing a commission, section 13 enacting that the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition, &c.

Section 14 enacts that the assignment to the assignee of the Insolvent Court is to be filed notwithstanding the issuing of a commission.

It appears reasonable to say that these sections apply to cases where acts of bankruptcy have been committed



1835. before proceedings were had recourse to under the Insolvent Debtors Act; and it is plain that the legislature contemplated that the remedy of a commission might be had recourse to for payment of debts, notwithstanding the discharge.

—  
*Ex parte*  
 BARRINGTON. In the matter  
 of  
 BARRINGTON.

Section 11 enacts that the prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee, &c. of all the estate, &c. of such prisoner, &c. and of all future estate, &c. which the prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall be entitled to his or her final discharge in pursuance of this act.

This provides for one species of future estate, viz. such as may come to the insolvent after execution of the conveyance, and before the operation of his final discharge, leaving property afterwards acquired open to the operation of another clause.

Section 46 points out that the insolvent's person is to be discharged from the debts there mentioned.

Section 57 enacts that the Court may require the prisoner to execute a warrant of attorney to authorize the entering up judgment against the prisoner, &c. for the amount of the debts stated in the schedule, and the Court may permit execution to be taken out thereon for such sum as the Court shall order, and such further proceedings are to be had upon such judgment as may seem fit in the discretion of the Court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied.

This clause shows that the debts still exist in contemplation of the legislature.

Section 58 enacts, that where the insolvent shall, after his discharge, become entitled to property which



could not be taken in execution under the judgment, and the insolvent refuses to convey to the assignee, the insolvency assignee may apply to the Court, who may order the insolvent to be imprisoned till he does convey.

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

Now it is remarkable that the act only provides in this meagre and collateral way for recovery of such after-acquired property. If the insolvent become subsequently possessed of stock, &c. which could not be affected by a judgment, it was necessary to provide for that by section 59. Real property would be recoverable under the judgment, but not an equity of redemption.

These things afford grounds for an inference that the legislature never contemplated that such kinds of property should never be in any way available, and, considering section 61, shows a commission to be the only way of doing this.

Section 60 enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, or for or by reason of any debt or sum of money or costs with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money or costs, or judgment, decree, or order for payment of the same, it shall and may be lawful for any judge of the Court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such



1835.

—  
*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

as herein-before mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to or acknowledged by the plaintiff, or such process, or being by him or her dispensed with by the acceptance of a dividend under this act or otherwise; and at the same time, if such judge shall in his discretion think fit, it shall and may be lawful for him to order such plaintiff, or any person or persons suing out such process, to pay such prisoner the costs which he or she shall have incurred on such occasion, or so much thereof as to such judge shall seem just and reasonable, such prisoner causing a common appearance to be entered for him or her in such action or suit." Now this clause plainly confines the benefit of exemption to the person of the insolvent.

Section 61 enacts, "that after any person shall have become entitled to the benefit of this act, by any such adjudication as aforesaid, no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act; and that if any suit or action shall be brought, or any *scire facias* be issued, against any such person, his or her heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall and may be lawful for such person, his or her heirs, executors, or administrators, to plead generally that



such person was duly discharged according to this act, by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially, whereto the plaintiff or plaintiffs shall and may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may show the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof specially." It appears to me that this section applies only to legal proceedings; for though the word "suit" might apply to a suit in equity, yet at law the proceeding is denominated a "suit." Moreover, this section speaks of "reply," which expression is inapplicable to a suit in equity. It therefore appears to me not to apply to suits in equity; but even if it did, the language of the whole act proves that no intent to discharge from a debt existed. If there existed a legal debt before the insolvency, it remains so after the insolvency to the amount still remaining unsatisfied.

*Jellis v. Mountford* (a) is not an authority directly decisive, but it is a complete authority so far as it justifies the reasoning with regard to the act as then in force. My opinion of the whole of the case is, that the commission is valid, and the petition must be dismissed with costs.

Lord Commissioner *Bosanquet*: —

This petition must be dismissed. I shall not consider the first question, viz. whether the debt of the

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

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(a) 4 *Barn. & Cres.* 256.



1835.

—  
*Ex parte*  
 BARRINGTON.  
 In the matter  
 of  
 BARRINGTON.

petitioning creditor was sufficiently described in the schedule, for my opinion proceeds on the same grounds as my brother commissioner's. It has however been laid down by several judges that the clause as to description is to be liberally construed. Nor shall I touch on the question of the sufficiency or insufficiency of the notice, in regard to which three or four cases were cited. I pass this branch of the case, because if the debt were formally included in the schedule, and the notice were sufficient, yet there is debt enough to support the commission on the petition of the present petitioning creditor.

There is no doubt the debt existed at the insolvency. The question is, whether the 7 Geo. 4, c. 57, discharges that debt? What is the benefit to which the insolvent is entitled under that act? Is the discharge complete in all respects, or qualified? Section 61 says "he may plead his discharge under this act." What then is that discharge? One under the words of the act. Does the act intend to discharge from the debt? If so, it is very badly worded, it being so easy to say "discharged from the debt." That the legislature contemplated issuing a commission is clear from the statute itself. The question in *Jellis v. Mountford* (a) was very similar, and, though not decided under 7 Geo. 4, c. 57, is in *pari materia*; and the former act contained expressions much stronger in favour of the discharge than the present. Nevertheless the King's Bench held the debt not gone, but still capable of supporting a commission. The 53 Geo. 3, c. 102, contains strong words, not in the 7 Geo. 4, c. 57, which passed after *Jellis v. Mountford* (a) was decided; and I think the alterations must be understood to have been made expressly to

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(a) 4 Barn. & Cres. 256.



prevent the extinction of the debt. The 10th, 30th, and 32d sections of 53 Geo. 3, c. 102, all contain words which might have afforded grounds for argument that the act intended to destroy the debt, but the contrary was held. The present act also declares him discharged from any new contract, which again implies the old debt existed as a consideration for such new contract. I therefore think, that if the act intended completely to discharge the debt, it would have been easy to have done so, and there is nothing to enable a court to draw an inference the other way.

I am therefore of opinion that the commission is good, and this petition must be dismissed.

1835.

*Ex parte*  
BARRINGTON.  
In the matter  
of  
BARRINGTON.

In the matter of WALKER.

**T**HIS was a petition which, after stating that a fiat had issued against the petitioner as coach proprietor, further stated that the petitioner was advised his having been part proprietor of a stage coach was not a trading within the meaning of the bankrupt laws, and that the question was attended with some intricacy, and that unless the merits of his case were stated to the commissioners, they might proceed to declare him a bankrupt, as having been engaged in buying and letting within the statute; that he was informed that the commissioners would not permit him to attend by his counsel at the opening of the fiat, except by order of the Court; that the declaring him a bankrupt would be attended with irreparable injury; that he was then absent from the kingdom. The prayer was as follows:—Your petitioner therefore most humbly prays your Lordships that

LORDS  
COMMIS-  
SIONERS.  
*May 26,*  
1835.

Recommendation to commissioners to hear counsel against the adjudication.

An order cannot be rescinded on motion.

Semble, a coach proprietor is not a trader.



1835.

—  
In the matter  
of  
WALKER.

the said fiat may be forthwith rescinded and annulled, and that your Lordships will be pleased to appoint an early day for the hearing of this petition; but if your Lordships shall not think fit so to order, then that your petitioner may be at liberty to attend by his counsel before the commissioners at the opening of the said fiat; and if the said bankruptcy shall be found, that such finding may be returned to your Lordships previous to its insertion in the Gazette, and that until it has been returned such insertion may be stayed, and that all the costs of and incidental upon this application may be paid by *William Biggs*, the solicitor.

An application was made by Sir *William Horne* and Mr. *Montagu* on the 6th of May 1835 to the Lords Commissioners, when their Lordships ordered that it be intimated to the commissioners that the Lords Commissioners considered this a proper case for the party to be attended by his counsel at the opening of the fiat, and ordered, that in case the commissioners should find the party to be a bankrupt, that the advertisement of the same be stayed, and that the proceedings taken thereunder be forthwith returned to the Lords Commissioners.

On the 7th of May notice was given of a motion on affidavits to rescind the order made, and to dismiss the petition upon which the order was grounded, and why Mr. *Ford*, the person signing such petition, should not pay the costs of and occasioned by the opposition to such petition and the rescinding the said order so made thereon.

Sir *W. Horne* and Mr. *Montagu* objected to this application being made by motion. They said that the invariable practice was to apply by petition, and that although the Chancellor sometimes decided on motion, as



before the commission was opened, to direct to what commissioners it should issue, or to alter a mistake, or for a prisoner to be discharged from arrest, or on behalf of a defendant in custody for a contempt who is entitled to his discharge by virtue of his certificate, or to amend an order in minutes, yet that the general rule of the Court was, that the only mode of proceeding was by petition, and so strict was the Court in adhering to this rule, that in *ex parte Gitten* (a) the Lord Chancellor says, "If an objection to a motion is made, a petition must be presented;" and, in the present case, who can doubt the propriety of relying upon every technical objection, when the object of the motion is to rely upon the hard practice of proceeding *ex parte* to declare a bankruptcy, and to deprive the person against whom the fiat is issued of the advantage which the Court thinks he ought to possess of being attended by his counsel? In *re Hardy* (b) the Court determined that a motion could not be made to adjourn a petition in bankruptcy, but that a petition must be presented; and, in *ex parte Weston* (c), where the whole practice is explained, the Lord Chancellor says, "Where an application in bankruptcy is rendered necessary, there is no enactment to alter the ordinary mode of proceeding, which, except in a few cases of necessity, has always been by petition, and that such rule was very salutary, as the attention of the petitioner would be excited, and his responsibility to the Court incurred by his signature to a petition, and so clear is it that the only practice is by motion, that in *re Morgan* (d) the Lord Chancellor says, "He cannot make an order on motion, and were he to make it, the disobedience would not be a contempt;" and in the present case there was

1835.

In the matter  
of  
WALKER.

(a) *Buck*, 549.

(b) 6 *Madd.* 252.

(c) *Mont. & Mac.* 82.

(d) 1 *Rose*, 192.



1835.

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In the matter  
of  
WALKER.

no application by the creditor, but it was merely a notice of motion by the attorney, without specifying in what the irregularity of which he complains consisted.

Mr. *Swanston* and Mr. *O. Anderdon contra* contended that the practice was to proceed in such cases by motion, a practice founded on the analogy to the general proceeding in equity.

*The Lords Commissioners*:—The constant course certainly has been, and is, to apply in bankruptcy by petition only, and we do not see any reason to deviate in the present case from such practice. The motion, therefore, must be dismissed with costs. (a)

(a) As the question respecting the trading is one of some difficulty, the argument before the commissioners is subjoined.

The words of the act are, "shall seek to gain their living by buying and letting for hire." 6 Geo. 4, c. 16, s. 2. The question is, what is meant by "letting for hire." One meaning is, when the proprietor parts with immediate dominion over the property, as a liveryman who lets his horse, or a landlord who lets his house, or a proprietor of horses who lets horses on job without finding the coachman, or a shipowner who lets his ship without finding the captain or master. In these cases, when the proprietor parts with dominion over the property, his responsibility as to injuries from the use

of the property is at an end; if he retain possession, it continues. In these cases the proprietor lets for hire.

Another meaning of the words "letting for hire" has been supposed to be, where the proprietor lets some of the property without parting with dominion over it. As a warehouseman, a wharfinger, a common carrier, a letter of job horses who finds the coachman, and hackney coach proprietors. In these cases the proprietor retains possession, and is responsible for any injuries attendant upon the misuse of the property. But these persons do not buy and let within the meaning of the bankrupt acts. Warehousemen and wharfingers, therefore, not being included within the words "letting for hire," are



Mr. *Montagu* attended the commissioners, and the commissioners did not declare the party a bankrupt.

1835.

In the matter  
of  
WALKER.

specially mentioned in the statute. In *ex parte Wiswold*, *Mont.* 263, it was determined that shareholders in a steam-packet were not traders, although it was argued that all carriers, including coach proprietors, were traders; but the Vice-Chancellor said, "The act does not mention carriers of any kind, nor does the holding shares in such a vessel constitute such a joint trading as the act contemplated." So in a case before Lord *Tenterden*, in Mr. *Palmer's* commission, his Lordship said, that it was not a trading; that it was not a contract to let, but a contract to carry.

The case is not reported, but the following statement was kindly communicated to me by Mr. *Francis Begley*, who was a commissioner of bankrupts in the 14th list, and was much interested in the question:—

"My dear Sir,

"Lord *Tenterden* has decided against the 14th list,—namely, that a shipowner is not within the Bankrupt Act. You will find the case reported in the *Times* of this morning, but the decision is not very accurately stated. His Lordship was of opinion that the owner of a ship which traded as a general ship, could not be considered as one

who bought and let for hire, but one who bought and carried for hire, preserving the control over the ship; it was proved that upon one occasion the ship was chartered, but his Lordship said that he had great doubt whether, if the ship had been always chartered, it would amount to a letting for hire within the meaning of the act, but that at any rate one act of chartering was insufficient. This decision is contrary to the opinions expressed in *Montagu*, *Eden*, *Archbold*, and *Holt's* treatises on the Bankrupt Act; and it is curious that the latter makes the letting the ship out to hire as a general ship the very ground for bringing the owner within the act. I confess it appears to me that the distinction is more subtle than solid, for, in principle, the letting a ship out to one merchant under a charter, or to several under bills of lading, appears pretty much the same thing. If you take any interest in the question, it is worth while referring to the Scotch Sequestration Act, 33 Geo. 3, c. 74, s. 13, and 54 Geo. 3, c. 137, s. 15, which, although it does not contain the words buying and letting for hire, expressly excepts from the operation of the act all persons having shares in the Forth and Clyde Navigation, or other inland navi-



C. of R.  
May 30,  
1835.

The commissioner cannot charge both assignees with twenty per cent. where only one had the money, unless he finds that the other "knowingly permitted" it.

Commissioners cannot open the audited accounts of assignees, without previous permission from the Court of Review.

*Ex parte* BENHAM.—In the matter of  
BRAMWELL.

THIS was the petition of *Benham* and others, creditors, and Mr. *Whitmore* the official assignee.

gation companies, or the British fisheries. This exception implies, that owners of ships are within the act, otherwise the exception is larger than the rule.

"Believe me, yours,

"My dear Sir,

"Very faithfully,

"JAMES HADDAN."

"Angel Court,  
Monday Morning."

So, too, in *Smith v. Scott*, 9 *Bing.* 14, it was assumed that the letting lodgings was not a trading.

But that it was not intended to be included in the statute may be inferred from the intentional omission of it by the legislature.

By the 5 Geo. 4, c. 98, s. 2, coach proprietors were included, but they are omitted in 6 Geo. 4.

The reason for the omission must be, either because it was not intended to include coach proprietors, or because they were included in the general words, "seeking their living by buying and letting for hire," which was contained in the statute; but to this the observation of Lord *Lyndhurst*, in *ex parte Burgess*, 2 *Gl. & J.* 200, will supply an answer:—"It is to be observed, says his

Lordship," that the 5 Geo. 4. contained the words, 'and all persons making bricks or burning lime for sale, being tenants, lessees, or partners in such trade or undertaking,' which words are omitted in the present act. It must therefore be inferred that they were omitted by the legislature, as not intending to include this description of persons, unless the reasoning of Mr. *Rose* is satisfactory, that they were omitted because they were already included under the words goods and commodities, which are to be found in both statutes; but I cannot think this a sufficient answer. I cannot think that an enactment of so much importance, and at such direct variance with all the principles of the bankrupt laws, would be made by omitting a description which could not be doubted, and leaving the question involved in the obscurity attendant upon these vague and general words." To which may be added, as applicable to this particular case, that buying and letting is more at variance with the principles of the bankrupt laws than any species of buying and selling.



A commission issued against *Bramwell* in 1826. *Wheeler* and *Butler* were chosen assignees, *Whitmore* was appointed official assignee, and *Mayhew* solicitor to the commission. *Wheeler* became bankrupt in July 1830. On the 23d of September 1831 an audit meeting was held under *Bramwell's* commission, when *Butler* presented his accounts as assignee, containing an item of 27*l.* for a bill of taxed chancery costs up to December 1828, and a sum of 50*l.* for other chancery costs taxed. This account was audited, balanced, allowed, and passed by the then commissioners. In March 1834 another audit meeting was held before Mr. Commissioner *Fane*, to whom the commission had been removed, and who then allowed, among other charges, a sum of 68*l.* for a taxed bill of a suit in Chancery, viz. the London Dock Company v. the Assignees. In January 1835 a third audit was held before Mr. *Fane*, who then entered the following memorandum on the proceedings: “ Mr. *Butler* retains in his hands a sum of 246*l.*, being the remainder of the sum of 625*l.*, admitted by him to be in his hands on the 23d of September 1831, after deducting the sums of 65*l.* and 313*l.* claimed to be due to the solicitors for their bills from the 23d of September 1831 up to the 23d of July 1833, without paying the same into the hands of the bankers chosen by the creditors. I have charged them with the sum of 90*l.*, being interest at the rate of 20*l.* per cent. per annum upon the said sum of 246*l.* for the period aforesaid; and it appearing to me that the expenses of a certain interpleading suit in Chancery, to which the said assignees were made defendants, in consequence of a claim made by them to certain wines in the custody of the London Dock Company, were occasioned by the conduct of the said assignees in refusing to abandon, and yet taking no step to enforce such claim, from the year

1835.

Ex parte  
BENHAM.

In the matter  
of  
BRAMWELL.



1835.

—  
*Ex parte*  
 BENHAM.  
 In the matter  
 of  
 BRAMWELL

1826 down to the present time; and it appearing to me that such expenses ought not, under the circumstances aforesaid, to be allowed as against the estate, I have re-charged the said assignees with the sums of 27*l.* and 50*l.* for which they have taken credit in an account rendered to the commissioners on the 23d of September 1831, as payments made to the solicitors for their bill of costs in such suit; and I have also re-charged them with the sum of 68*l.*, for which credit is taken in the account marked B. filed with the proceedings for March 1834, as a payment made to the solicitors for their further charges in the same suit; and it appearing to me that there is an overcharge in the sum of 65*l.* charged in the said account marked B. of 6*l.*, and an overcharge in the sum of 313*l.* charged to the same account of 12*l.*, and an overcharge in the sum of 14*l.* charged to the same account of 3*l.*, I have further charged the said assignees with the said sums of 6*l.*, 12*l.*, and 3*l.*; and I find that there is now due from the said assignees the sum of 259*l.*, the particulars of which are set forth in the account hereunto annexed marked C.; and I direct the said assignees and each of them to pay the said sum to Mr. *William Whitmore*, the official assignee in this matter."

This was a petition by *Benham* and others, creditors, and *Whitmore* the official assignee, stating the above facts, and that *Wheeler* was out of the jurisdiction, and that the sums making 168*l.* had been in fact received by the solicitors; and therefore praying, that they might be paid by the solicitor, that *Butler* might be ordered to pay the 90*l.*, and that the costs might be paid by *Mayhew* and *Johnston*.

The parties were willing to repay the 6*l.*, 12*l.*, and 3*l.*, those sums having been overcharged by mistake.



Mr. *J. Russell* and Mr. *Bacon* for the petition:—The respondents contend, that the commissioner had no jurisdiction to open accounts once audited; but in *ex parte Applegarth* (a) the Chief Judge observed, “But it is said, that as the audits have passed the commissioners have, as it were, become *functi officio*; to this I cannot subscribe; I think the duty of the commissioners is progressive and continuous.” But granting that the commissioner had no jurisdiction to make the order, yet, as it is not appealed against, it must be taken to be good. [Sir *George Rose*:—Suppose the order of the commissioners correct, it limits the demand to the assignees; how thereon do you raise any case against *Mayhew* and *Johnston*? The CHIEF JUDGE:—If the assignees have employed a solicitor he must be paid, though the assignees may not be allowed the payments as against the estate.] The Court have power over the solicitor under the general jurisdiction. [The CHIEF JUDGE:—If the solicitor gives the assignees bad advice, he may be liable to them; but this is not an application by the assignees against a solicitor.] The monies are a trust fund, and if they come to any person with notice, he is a trustee. [Sir *George Rose*:—These are not trust monies in the hands of the solicitor; if assignees pay sums improperly, it is the same as if they had not paid them; besides, the certificate of the commissioners finds the money in the hands of the assignees.] But for the bills of *Mayhew* and *Johnston*, the estate would have paid 12s. 6d. in the pound; as it is, it pays nothing. [*Per Curiam*:—The petition asks twenty per cent. against both assignees; that is wrong; one has been bankrupt, and should not pay.]

1835.

*Ex parte*  
BENHAM.

In the matter  
of  
BRAMWELL.

(a) *Ex parte Applegarth*, 2 Dea. & Ch. 101.



1835.

Mr. *Swanston*, Mr. *G. Richards*, and Mr. *Bethell* were stopped by the Court.

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*Ex parte*  
BENHAM.

In the matter  
of  
BRAMWELL.

*Per Curiam* :—As to a portion of the prayer, the Court is of opinion the petitioners are not entitled, and therefore will relieve the respondent from the necessity of arguing that part, viz. so much as relates to the twenty per cent., which charge is founded on 6 Geo. 4, c. 16, s. 104, which enacts, “that if any assignee shall retain in his hands, or employ for his own benefit, or knowingly permit any co-assignee so to retain or employ, any sum to the amount of 100*l.* or upwards, part of the estate of the bankrupt, &c., every such assignee shall be liable to be charged in his accounts with such sum as shall be equal to interest at the rate of twenty per cent. on all such money, for the time during which he shall have so retained or employed the same, or permitted the same to be so retained or employed as aforesaid, and the commissioners are hereby required to charge every such assignee in his accounts accordingly.” The first part of the commissioner’s order appears as if it meant to find that *Butler* had the money in his own hands, and in conclusion orders both assignees to pay. *Butler* does not admit it was in his hands in particular. Before, therefore, this Court are called on to enforce the order as to the twenty per cent., it should first be made out that it was properly made. We do not decide whether or not the commissioner can in this matter charge any one twenty per cent.; we only decide that the Court cannot enforce the order as now made. The commissioner could not charge both for the retainer, of one, unless he found in the words of the act that one “knowingly permitted” the other to retain, &c. The Court also relieves from all argument as to the sums already



audited by the former commissioners, and which cannot be re-audited without the order of this Court. If the audit is wrong the Court might order a new audit, but without such order the commissioner cannot open the audit.

1835.

—  
*Ex parte*  
BENHAM.  
In the matter  
of  
BRAMWELL.

Mr. *J. Russell* replied:—The commissioners directed the petition, therefore, if dismissed, it cannot be with costs. [Mr. *Swanston*:—It does not appear that it was presented by the order of the commissioner.] I can procure a certificate to that effect from the commissioner. In a late case before the Master of the Rolls, Mr. *Bethell* stated, that a master directed an application to the Court, and the Court allowed the matter to stand over to ascertain that point before deciding as to costs.

The CHIEF JUDGE:—This is a petition by creditors to enforce an order of the commissioner. If the question depended upon my personal respect for that commissioner, I should confirm the order; no commissioner is better qualified, and none takes more pains; but the judgment of this Court must be formed independently of all such considerations. It appears to me the order should not have been made. The order is first against the two assignees, and they are ordered to pay to the official assignee under the 40th section of 1 & 2 W. 4, c. 56. The commissioner has found 246*l.* to be in the hands of one of the assignees, and has directed both the assignees to pay that and other sums to the official assignee. As to the charge of 90*l.*, part thereof, I have already disposed of that; it is a sum composed of twenty per cent. on money retained for nearly two years; but though in the hands of the assignees it does not appear to have been so culpably; the commissioner simply finds the money to have been in their hands. As to the 27*l.*,



1835.

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*Ex parte*  
BENHAM.In the matter  
of  
BRAMWELL.

it is for a bill of costs in Chancery; the commissioner disallows the whole sum, because it refers to a suit improperly defended by the assignees on a bill of interpleader, where the assignees would neither enforce or reject their claim. But its date is from 1827 to 1828, and now, after that length of time, the creditors come forward to object. In 1831 that bill came before the commissioners, and was taxed, and also audited in the assignees' accounts, it therefore appears singular that the creditors should now come forward; but it appears that the commissioners directed that actions should be brought, and the dividend was suspended on account thereof. There is this short objection to the act of the commissioners, viz. that the sums are already allowed in a former audit, which therefore cannot be opened without the order of this Court. There might be no end of vexation to assignees if audited accounts could be opened whenever commissioners pleased, unless leave to falsify or surcharge were previously given by the Court. These observations apply to both the 27*l.* and the 50*l.* As to the bill for 87*l.*, that was not allowed by the old commissioners, but by Mr. *Fane* himself in July 1833, when he taxed and allowed it. Being so taxed and introduced by the assignees into their accounts, it should not have been disallowed without the order of the Court. Other little items are submitted to. If the petition had only asked these latter the demand would not have been resisted; therefore the petition cannot be sustained on account of success as to them. But the solicitors are made parties, and called on to pay 168*l.* It may be that there are improper items in their bill of costs; it may be that the assignees should not have defended the suits; but that is not enough to enable creditors to call on them to refund. They were employed by the assignees, who might be liable, though I think even the



latter would not in this case. As against the solicitors the petition is dismissed with costs. As to the assignees, the commissioner made an order, and the creditors came to enforce it. The general rule (which has exceptions) is, that costs are not given against an order of the commissioners; but here the parties are not within that rule. They come to support it, and there is no reason why they should not be visited with costs, if unsuccessful, like any other party. Would it be just to make the respondent suffer? As to the official assignee, as he merely joins in his official capacity, the Court gives no costs against him on this particular occasion.

1835.

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*Ex parte*  
BENHAM.  
In the matter  
of  
BRAMWELL.

*Sir John Cross*: — As to the 20% per cent., this Court does not decide whether or not the commissioner can charge any other person in any other way; it merely declares that the charge as now made is invalid. The commissioner not only disallows the bill of costs, but gives his reason, viz. that the assignees set up a claim which they neither followed up nor abandoned. With the greatest respect for the commissioner, this is not a sufficient reason, especially as the former commissioners had allowed the bill. An audit should be treated as a very solemn proceeding, and one had taken place before the old commissioners two years previously. I concur with the first commissioners. After the allowance by the commissioners, the creditors acquiesced for nine years. There is no shadow of case against the solicitors. The commissioner's order does not touch them. I concur in the order.

*Sir George Rose*: — I concur in the order. The official assignee is not exempted from costs on any general principle, but because it seems right in this



1835.

*Ex parte*  
BENHAM.  
In the matter  
of  
BRAMWELL.

There is jurisdiction to reach any part of the estate in the hands of the solicitor to the fiat.

particular case. There is no such principle as that the certificate of the commissioners is a protection from costs. If there were, this is no certificate; it is a mere statement of facts, as there was no reference; but if it were, what part of the document would protect from costs? There is nothing in the certificate to sanction the application as against the solicitor. No doubt there is jurisdiction in this Court to reach any part of the estate in the hands of the solicitor to the fiat; but if the assignees who employed him be, as here, solvent, then, as the estate has nothing to do with the question, the Court is not called on to fix its jurisdiction on the solicitor. The former commissioners, having dealt with and allowed these items in account, have separated them from the body of the estate. Till opened the audit is conclusive, and it can only be opened by order of this Court. The 6 Geo. 4, c. 16, does not disable assignees from carrying on suits, but it puts on the check as to the allowance of costs by the commissioners; and if I were a commissioner I should not consider the question as more than one of receipt and expenditure, as between trustee and estate, save in a very gross case, and even then I would refer to the Court above. The expenses of any useless suit is an indirect test of the damage to the estate. Whether it should be allowed is a question for another Court.

Petition dismissed, with costs as against all the petitioners but the official assignee.



*Ex parte* PORTER.—In the matter of DEACON.

C. of R.  
June 4,  
1835.

IN March 1833 *Deacon* applied to *Porter* to join in a joint and several promissory note to the Stamford and Spalding Joint Stock Company for 275*l.*, as security to the company for that sum, to be advanced by the company to *Mary Gilbert*. The note ran, "We jointly and severally promise to pay," &c. *Deacon* received the money for *Mary Gilbert*, and *Deacon* and *Porter* were debited with the amount by the company. A fiat issued against *Deacon* on the 19th September 1834, and *Mary Gilbert* became insolvent. Since the bankruptcy the company called on *Porter* to pay the 275*l.*, which he had done, and tendered a proof against *Deacon*, which the commissioners rejected. This was a petition to prove.

If *A.* and *B.* give a joint and several promissory note for the debt of *C.*, and *B.* becomes bankrupt, and *A.* pays the amount, he cannot prove against *B.* as a surety under section 52.

Mr. *Wood* for the petition : — The petitioner seeks to prove under the 6 Geo. 4, c. 16, s. 52 (*a*), as having

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(*a*) "That any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety liable or bail as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." — 6 Geo. 4, c. 16, s. 52.



1835.

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*Ex parte*  
 PORTER.  
 In the matter  
 of  
 DEACON.

been surety for the bankrupt. It was decided in *Clements v. Langley* (a), that one co-surety could not prove, under 6 Geo. 4, c. 16, s. 52, against another who became bankrupt; but this is not a case of co-suretyship. On the face of the bill in question the petitioner is a principal debtor. As regards the bankers, both *Porter* and *Deacon* were jointly and severally liable; but each, in equity, was liable to the other for one half. So that the petitioner, as to one half, was liable or surety for the bankrupt. A drawer of a bill, though not strictly a surety for the acceptor, yet is in the nature of a surety, and within the 52d clause, as may be collected from what Lord *Eldon* says in *ex parte Younge*. (b)

Mr. *Swanston* for the assignees.

THE CHIEF JUDGE : — There was no debt before the bankruptcy due from the bankrupt to the petitioner. The 52d section only applies where a party is “surety for or liable to any debt of the bankrupt.” Here the petitioner was not surety for the bankrupt, but, jointly with the bankrupt, was liable to the bank for the whole. At the time of the bankruptcy no debt existed from the bankrupt to the petitioner.

Sir *John Cross* : — The petitioner was not a co-surety, nor a surety, but a co-debtor.

Sir *George Rose* : — The debt, to be proveable, may be incurred as late as the bankruptcy, but no later; thus in partnership, the bankruptcy is a dissolution, which *eo-instanti* creates a debt. If the sum here had been

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(a) *Clements v. Langley*, 2 Nev. & Man. 269.

(b) *Ex parte Younge*, 3 Vcs. & Bea. 40.



paid before bankruptcy it might have been proveable, but no action could have been brought before the bankruptcy; therefore there could be no proof, save under the surety clause; but the petitioner is not under that clause, not being liable for the debt of the bankrupt, but for his own debt.

1835.

*Ex parte*  
PORTER.  
In the matter  
of  
DEACON.

Petition dismissed.

*Ex parte* GRAY.—In the matter of GRAY.

C. of R.  
June 4,  
1835.

PRIOR to 1829 *Gray* was a chemist at New Bond-street; his property consisted of a lease for thirty-six years, a stock in trade, and furniture. In 1829 a commission issued against him. The assignees sold the premises, stock, and furniture to him for 2,200*l.*, and *Hodges* and *Far* became sureties for payment. It was then agreed that *Hodges* should advance the whole 2,200*l.*, and enter into partnership with *Gray*; that 1,100*l.* should be *Hodges*'s share in the capital, and 1,100*l.* *Gray*'s share; the articles of partnership were executed on the 3d of November 1829, and thereby the property purchased with the 2,200*l.* was agreed to be the joint stock, and that *Hodges* should take out of the profits five per cent. for 1,100*l.*, a moiety thereof, being the portion of capital brought in or paid for *Gray*; *Gray* covenanted, that if *Hodges* advanced any sums to the partnership beyond that already advanced, the joint stock, &c. should be liable to repay *Hodges* as well the share of 1,100*l.* as every sum to be thereafter lent, with interest; and if the joint stock should be insufficient, then *Gray* should make good the 1,100*l.* out of his separate estate. The deed contained a proviso for dissolution on one month's notice in writing, &c.; and, by an in-

Qu. Whether a mortgagee in trust can alone issue a fiat against the mortgagee on the mortgage deed? He can, if the legal validity of his debt had been previously established by an action at law. Per C. J.—If a partner files a bill, and treats a debt as mixed with the partnership, a fiat cannot afterwards be issued on that debt.



1835.

—  
*Ex parte*  
 GRAY.

In the matter  
 of  
 GRAY.

denture dated the 4th of November 1829, *Gray* assigned the lease, stock, and furniture to *Hannan*, in trust by way of mortgage to secure repayment of the 1,100*l.* to *Hodges*, and containing the usual covenant from *Gray* to *Hannan* to pay the 1,100*l.* On the 12th of February 1835 *Hodges* gave notice to dissolve the partnership, and on the 13th March 1835 filed a bill for a dissolution and account, and that it might be declared that the lease, stock, and furniture (subject to the mortgage) formed part of the partnership assets, and that the lease might be sold, and the proceeds applied accordingly. On the 28th March 1835 *Hannan* issued a fiat against *Gray* on the debt of 1,100*l.*, stating that *Gray* was indebted to him in 1,100*l.* by virtue of the mortgage, and *Hannan* was chosen sole assignee: The lease was sold to an agent of *Hodges*, who had leave to bid. .

This was a petition to annul the fiat, stating the above facts; alleging the fiat was taken out to obtain the business, &c. for *Hodges* alone, and that there was not a good petitioning creditor's debt. *Hodges*, in an affidavit, denied that he caused the fiat to be taken out in order to obtain the business and the residue of the lease for himself, or for any other than a proper purpose.

Mr. *Roe* and Mr. *Bethell*, for the petition, were stopped by the Court.

Mr. *Swanston* and Mr. *Ching* *contra* : —

There are two questions: first, whether there is a good petitioning creditor's debt; second, how far the conduct of the petitioning creditor in issuing the fiat has been inequitable. 1st, The question is not whether there is a legal debt, but whether a court of equity will allow this fiat to stand. As the *cestui que trust* does not oppose, why should not the fiat issue? There is a debt existing,



and on that debt some person must have a right to issue a fiat; but who? *Hodges* cannot, as his debt is an equitable debt only. Both cannot, as they cannot swear the debt is a joint debt due to both. *Hannan* alone could give a release; he alone could bring an action. A fiat is as a statutable execution on behalf of all the creditors. In an action at law *Hodges* could not be joined as plaintiff. Is the debt so blended with the partnership account that *Hodges* is prevented bringing the action? and if so, is his trustee prevented? Both the articles of partnership and the mortgage-deed treat the debt as distinct, especially the latter. Partners may, by contract, take a sum out of the partnership assets, and give one partner a power to sue the other thereon. It is immaterial how any specific sum is separated and distinguished from the bulk of the partnership assets. Suppose an account stated, and the partnership continued, an action could be brought for the balance of that account by one partner against the other. In this case the subject matter of this petition never formed part of the partnership assets, and if it ever did it was separated from the estate by the course of dealing. If one partner lend another a sum, a fiat may be supported on that loan, *ex parte Notley*. (a)

As to this sum being complicated with the partnership account, such is not the fact; the sum is secured by a separate deed. In *ex parte Notley* (b) Sir George Rose says, "This appears to be a distinct debt, for which an action might have been brought notwithstanding any partnership;" and here the debt is as separate as if there had never been a partnership; *Gray* kept the partnership books, and there is no entry of this debt.

1835.

*Ex parte*  
GRAY.

In the matter  
of  
GRAY.

(a) *Ex parte Notley*, 1 Mont. & Ayr. 46. S. C. 3 Dea. & Ch. 367.

(b) *Ex parte Notley*, 1 Mont. & Ayr. 48.



1835.

THE CHIEF JUDGE:—

—  
*Ex parte*  
 GRAY.  
 In the matter  
 of  
 GRAY.

This fiat is issued on the petition of *Hannan* alone. The deed creating the petitioning creditor's debt shows that *Hannan* was a trustee only: a trustee cannot prove a debt as owed to himself, as he cannot swear the money is due to him; the *cestui que trust* must join in the proof, and swear the money has not been paid to him. *Ex parte Dubois* (a), *Hannan* should not strike the docket as on a debt due to him alone; and if he stated the fact, that he was a trustee, then his *cestui que trust* must have joined in the affidavit of debt. A fiat might, however, be supported on the debt of a trustee alone, if the trustee had previously established the legal validity of his debt by an action at law.

In this particular case the Court might adopt means to render this fiat valid, if expedient so to do. To ascertain that, the other circumstances of the case must be considered. It appears that *Gray* has before now been bankrupt, and that after he had obtained his certificate his assignees agreed to sell to him certain parts of his estate for 2,200*l.*, which sum *Hodges* undertook to pay, on an agreement that he was to enter into partnership with *Gray*, which he did; but it was arranged that *Gray* should be debtor to *Hodges* for 1,100*l.*, one half of the purchase money, and the interest was to be paid out of the profits of the business. It was also agreed that *Hodges* should have a lien on the joint stock for this 1,100*l.*, as well as for any subsequent advances which he should make. Thus the 2,200*l.* became one mixed partnership fund, and the sums advanced by *Hodges* remained on security of the joint stock till the concern should be wound up. At the same time *Hodges* was

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(a) *Ex parte Dubois*, 1 Cox, 310.



further secured repayment by a mortgage, dated indeed the day after the articles of partnership, but obviously part of the same transaction. After the dissolution a bill was filed against *Gray*, to declare the dissolution, and for an account, claiming all the partnership stock under the deed. It appears that *Hodges* here treated the question as one to be settled by reference to the partnership account, and that was the basis on which the matter was wound up in Chancery. Whatever were the rights of *Hodges*, independently of this bill in equity, he has there treated the sum in question as entering into the partnership account, after which this Court ought not to assist him in supporting a fiat on the same debt, treated as one independent of the partnership account, especially as the fiat cannot be issued with a *boná fide* intention of distributing the assets of *Gray* among his creditors, as he has no separate property to distribute; and *Hodges* in his bill states all the joint property to be his. The fiat was therefore issued solely to make good the dissolution of the partnership. *Hannan*, being a trustee, could not correctly swear that the debt was due to him alone, and being by the acts of *Hodges* mixed up with the partnership assets, prevents his joining to make up a good petitioning creditor.

Sir John Cross :—I hope it will not be imagined that this Court lays down any general rule that a mortgagee in trust cannot alone be petitioning creditor; upon that question my judgment is open. The ground of my judgment is, that there is no shadow of reason for supposing the fiat to be sued out *boná fide* for the benefit of the separate creditors; there is but one separate creditor, whose debt is 5s. The fiat is sued out, as ancillary to the bill, to effect a dissolution.

1835.

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*Ex parte*  
 GRAY.

 In the matter  
 of  
 GRAY.



1835.

—  
*Ex parte*  
GRAY.  
In the matter  
of  
GRAY.

Sir *George Rose* : — This Court has no disposition to supersede a fiat issued against an insolvent person, if it can in any way be sustained. A fiat is unquestionably the right of the creditor. The covenant in the mortgage deed, to pay the mortgage money to *Hannan*, creates a legal debt sufficient to enable *Hannan* to support the fiat in law, but it does not follow that therefore this Court will uphold the fiat, as it must not only be sustainable as a legal but also an equitable process. I do not think (if the officer's attention were called to the circumstance) that the office would issue a fiat on a deposition referring to a deed which showed the debt to be a trust debt. If the *cestui que trust* comes forward and declares his acquiescence, then the fiat might be supportable; but a fiat could not be supported, if, when the *cestui que trust* came here prepared to acquiesce, the bankrupt were to step in and say, "A state of circumstances exists which, in equity, estops you from consenting, and you shall not consent." In this case I should annul the fiat, if *Hodges* had joined, and assented all through, on the face of the proceedings. One partner may issue a fiat against the other on a debt separated from and independent of the partnership. This debt is not unmixed with partnership; it has been treated all through as a partnership debt, and was to await the winding up of the partnership accounts for its discharge; and the deed provides that the partnership property is to be charged with the debt. The act of bankruptcy was prior to the filing of the bill; but *Hodges*, instead of issuing a fiat, filed a bill. This was an election not to issue a fiat.

Fiat annulled, with costs.



In the matter of HYSLOP.

C. of R.  
June 5,  
1835.

THE assignees had made an arrangement, whereby certain of the creditors who claimed priority were to be paid 10s. in the pound under one estate, and then the estates to be consolidated, and all the creditors to receive dividends rateably. All the creditors but one assented; that one neither assented nor dissented. This was an *ex parte* application by the assignees for the sanction of the Court to the proposed arrangement.

The assignees having made an arrangement concerning the payment of the creditors' debts, a reference was ordered to the commissioners whether it were beneficial.

Mr. *Stephens* for the petition.

*Per Curiam*: — Take a reference to the commissioners to consider whether the proposed arrangement be beneficial to the estate.

*Ex parte* HALFORD and others. — In the matter of  
WOODWARD.

C. of R.  
June 5,  
1835.

THE petitioners were creditors of the bankrupt. There was a dispute as to the amount of their proof, which was finally allowed for 7,183*l.* and a claim for 2,202*l.*, and 1,526*l.* was to be refunded by the petitioners, or deducted from the dividend. This was in the year 1808. The petitioners objected to this, and finally a dividend was declared, of which the petitioners' share, on the whole sum they claimed (9,745*l.*) was 2,394*l.* The assignees sent a cheque for 868*l.*, deducting the 1,526*l.*, and requiring a receipt in full for the 2,394*l.*, which was refused to be signed by the petitioners. A bill for 868*l.*, the amount of the dividend, was sent to

A dividend having been declared twenty-eight years ago, and the amount invested, the creditor was now held entitled to the interest which had accumulated.



1835.

—  
*Ex parte*  
 HALFORD  
 and others.  
 In the matter  
 of  
 WOODWARD.

*Hudson*, one of the assignees in London, specially indorsed to the petitioners, which special indorsement was erased, and then the bill stood indorsed to *Hudson* alone, who indorsed it over to his private bankers, and the amount, or greater part, was from time to time invested in Exchequer bills, and interest thereby made. In 1809, on the petition of the assignees, *Hudson* was ordered to pay the 868*l.* and the interest made thereon into the Bank of England, and it was there invested in stock; of this the petitioners were ignorant till lately.

The petition prayed, that the petitioners might be declared entitled to the stock so purchased and the interest.

There were also other smaller sums and interest thereon in question.

Mr. *Bethell* and Mr. *Stephens*, for the petition, were stopped by the Court.

Mr. *Swanston* and Mr. *Purvis*, *contra*: — The petitioners having rejected the dividend twenty-eight years ago cannot now claim it or the interest made thereon; it was not kept separate at their risk. The petitioners having once rejected, cannot point out any moment when the particular fund again became theirs. The order of dividend does not appropriate any specific sum for which trover would lie, only an action of assumpsit could be brought; neither the moment of giving the bill, nor while it was on its journey to London, nor at its arrival at *Hudson's*, nor the erasure of the special indorsement, acted as an appropriation. The tender did not, for it was repudiated. The specific fund, therefore, never was appropriated to the petitioners, or if it were, it was rejected; but at any rate they are not entitled to interest till after they made the demand.



**Sir John Cross :—** They are not entitled to interest against the assignees personally till after the demand, but they are entitled to it as the produce of the fund.

1835.

—  
*Ex parte*  
HALFORD  
and others.  
In the matter  
of  
WOODWARD.

**The CHIEF JUDGE :—** It is quite clear the petitioners are entitled to the interest of money set aside to answer their dividend. The assignees gave a bill for 868*l.*, and demanded a receipt in full for 2,894*l.* (and not a qualified receipt for 868*l.* without prejudice); the petitioners refused to sign the receipt in these terms, whereon the special indorsement to the petitioners was erased, and *Hudson* took the bill: this is a separating the amount from the mass of the estate. Afterwards the assignees petitioned, stating that *Hudson* held the money as belonging to the assignees, and the order of the Lord Chancellor did not decide the rights of the parties, it only directed the amount to be paid into Court, when it was invested and has remained so. There was a clear separation of the specific fund, and from that time the petitioners were entitled to its fruits. The other sums are traced by other means; but if any doubt exists, there may be an inquiry as to them.

**Sir John Cross :—** I concur. The order of dividend appropriates the fund to the creditors, which thenceforth becomes a trust fund.

**Sir George Rose :—** The demand is founded on obvious and indisputable principles. How do the assignees discharge themselves from this 868*l.*? Not by sending the bill to London, for the creditor did not adopt it; if he had, he would have acquired a property in the bill, or the proceeds thereof; but he did not, the offer being clogged with terms to which he would not accede. The petitioners had no right to the bill or the



1835.

*Ex parte*  
HALFORD  
and others.  
In the matter  
of  
WOODWARD.

proceeds thereof in the hands of *Hudson*, therefore the assignees still remained liable for the amount. If no demands were made on the assignees, they were not bound to take any steps; when a demand was made they became personally liable to five per cent. interest; but the petitioners (properly enough) do not insist on that: the petitioners were no party to Lord *Eldon's* order, and not bound to notice it.

Dividend ordered to be paid, and the interest thereon as accumulated. Costs of each party out of own funds.

C. of R.  
June 6,  
1835.

In the matter of WELLMAN.

When a country fiat is superseded because the commissioners decline to act, and a new one issues to a London commissioner, this is not a "removed" fiat under 1 & 2 W. 4, c. 56, s. 47, and full fees must be paid.

IN this case, the commissioners having (for a reason not necessary to state) declined to act, the fiat was superseded, and a new one issued to a London commissioner. The question was, whether the petitioning creditor must pay the sums required by 1 & 2 W. 4, c. 56, ss. 45, 46 (a),

(a) That there shall be paid to the Lord Chancellor's secretary of bankrupts, upon the granting of fiats in lieu of a commission of bankrupt by virtue of this act, the sum of ten pounds; and the sums to be so received by the said secretary shall be by him paid, once a week or oftener as the Lord Chancellor shall think fit to direct, into the Bank of England, to the credit of the accountant general of the High Court of Chancery, to a separate account to be entitled "The Secretary of Bankrupts' Account;" and all monies to be paid into the said account shall be subject to such general orders touching the payment in, investment, accounting for, and payment out of such monies for the purposes herein-after provided, as the Lord Chancellor shall from time to time think fit to prescribe." — 1 & 2 W. 4, c. 56, s. 45.

"That there shall be paid to the said accountant general, to be placed by him to the like account by the official assignee of



or whether the case was within the 47th section (a) of that act.

1835.

In the matter  
of  
WELLMAN.

Mr. *J. Russell* applied.

The Court decided this to be an original London fiat, not one "removed" under the 47th section; and that, therefore, the fees were payable under sections 45 and 46.

*Ex parte* MARTIN.—In the matter of KENTON.

C. of R.  
June 10,  
1835.

IN this case a fiat and proceedings had been ordered to be impounded. (b) The petitioner was no party to the order. This was an application that the fiat might be delivered out of the office to enable a debt to be proved.

If a fiat is impounded on the application of A., a petition for its delivery out presented by B. must be served on A.

Mr. *Swanston* for the petition.

Mr. *Bethell*, *contra*.

each bankrupt's estate to be administered in the said Court of Bankruptcy, out of the first monies that shall come into his hands, and immediately after the choice of assignees by the commissioners, the sum of twenty pounds."—1 & 2 W. 4, c. 56, s. 46.

(a) "That in all cases of commissions of bankrupt which by virtue of the provisions herein contained shall be removed into the said Court of Bankruptcy, and under which the choice of

assignees shall have taken place prior to the commencement of this act, there shall be paid by the assignees of each bankrupt's estate, in lieu of all other sums directed to be paid under and by virtue of this act, the sum of three pounds on every sitting under such bankruptcy which shall be held in the said Court."—1 & 2 W. 4, c. 56, s. 47.

(b) See *ex parte Devas*, 1 Mont. & Ayr. 420.



1835.

*Ex parte*  
MARTIN.In the matter  
of  
KENTON.*Per Curiam* :—The petitioners under the former petition, when the fiat was impounded, are not served, therefore the application cannot be granted.

No order made.

C. of R.  
June 10,  
1835.

Where the commissioners were absent from the first meeting, the Court will appoint another.

*Ex parte* HALL.—In the matter of THOMPSON.**MR. HALL** :—The commissioners were absent from the first meeting, which consequently was not held, nor was any adjournment ordered; the commissioners considered themselves *functi officio*.

This is an application to the Court to appoint another first meeting; which was ordered.

C. of R.  
June 10,  
1835.Blythe was the agent for Maberly, a banker: 450*l.* was sent to Blythe, as agent, to retire a note of the petitioner's, which was not done, as Maberly became bankrupt.Blythe having a claim against Maberly, the assignees allowed him to retain 2,000*l.* including, as was assumed, the 450*l.* : held the petitioner was entitled to recover the 450*l.* from the assignees.*Ex parte* SIMPSON.—In the matter of MABERLY.**THE** leading facts in this case are the same as in *ex parte Cunningham*. (a) The particular facts of this case were as follow :—On the 3d of January Groves, the agent of the petitioner, remitted 450*l.* to Blythe, as the agent of Maberly, in order to retire an acceptance lying at Smith and Co.'s, bankers in London, not then having any notice of the act of bankruptcy. On the 4th of January Blythe received a letter from Maberly stating his failure; Blythe therefore did not retire the bill, and the money was remitted to Smith and Co., and the bill retired by Groves the petitioner's agent, who thereupon sent through his law-agent a letter to Blythe, claiming the 450*l.* as having been paid to him for a spe-(a) *Ex parte Cunningham*, Mont. & Bli. 269.



cific purpose ; to which the law-agent of *Blythe* returned the following answer : — “ Mr. *Blythe* has received your letter. He cannot commit himself in any respect as Mr. *Maberly*’s agent, without instructions from London. In the meantime we have given directions to keep every thing entire, and to make no remittances to London or elsewhere until he and the creditors are further advised on the subject of your and similar claims. I am,” &c. The process in the Scotch Courts took place, as mentioned in *ex parte Cunningham*. (a) Under these proceedings the petitioner would have carried in his claim, but the Scotch Courts decided all such questions should be decided by the Court of Review. The petition stated these facts, and “ that the assignees claimed the said sum of money so delivered by *Groves* as being part of the estate of the bankrupt, and have, as your petitioner hath been informed and believes, received and now retain the same.”

The petition prayed that the assignees might be ordered to pay the same to the petitioner. It appeared from the affidavits in reply, that on the 3d and 4th of January *Blythe* made payments on behalf of *Maberly* amounting to 1,311*l.*, and that the particular notes composing the 450*l.* could not be traced. The official assignee denied that the 450*l.* had been paid over to the assignees, but stated that above 2,000*l.* had been allowed by the assignees to remain in the hands of *Blythe*, on account of a counter-claim of *Blythe*’s.

Mr. *J. Russell* and Mr. *Bethell* for the petition.

Mr. *Swanston* and Mr. *Montagu* contra.

1835.

—  
*Ex parte*  
SIMPSON.  
In the matter  
of  
MABERLY.

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(a) *Ex parte Cunningham*, Mont. & Bl. 269.



1835.

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*Ex parte*  
 SIMPSON.

In the matter  
 of  
 MABERLY.

The CHIEF JUDGE:— The majority of the Court is of opinion that the petitioners are entitled to what they ask, I am of a different opinion; but as the majority of the judges will make the order, I thought it not necessary that Mr. *Russell* should be heard in reply. The facts briefly are, that the assignees received the 450*l.*; how they received it does not appear, whether in notes or cash; but *Blythe* had paid away 1,311*l.* in the ordinary course of business before he had notice; and it appears that it cannot be ascertained whether or not the sum in question were paid out or left in the hands of *Blythe*; consequently there is no evidence of that sum being in *Blythe's* hands at the time of instituting the suit in Scotland, therefore I am not satisfied of the fact that the money came to the hands of the assignees, and cannot concur in the order.

Sir *John Cross*:— This is one of those cases in which the burthen lies on the assignees to prove that the petitioner is not entitled. The assignees, to succeed in their opposition, must show that the property is not traced to their hands, or that if it is, yet that they are entitled to retain it as part of the estate of the bankrupt. If the sum is identified, the assignees must repay it, as having been paid under a mistake, viz. an idea that *Blythe* was an agent of *Maberly*, a banker in London, whereas he was then no banker, and could have no agent; being paid under this mistake, the petitioner without doubt could compel *Blythe* to refund; and as the assignees took the money out of *Blythe's* hands, the same observation applies to them. But the assignees contend that the money never came to their hands, and that the petitioners have failed in proving that it did; but who is in possession of the facts? The assignees;



and they could disprove the allegation if it were untrue. The petitioner shews a delivery to *Blythe* on the 3d of January, and proves the stoppage the day before, and that the petitioner applied a day or two afterwards and was refused; next the assignees stepped forward and took every thing *in statu quo*; it is therefore for them to prove that this sum was not included. It is said the petitioners cannot ear-mark or identify the sum. It is not necessary to identify the particular coin, there is all the identity which the nature of the case allows. Suppose a definite quantity of quicksilver belonging to one man mixed with a larger quantity of another man's, the former could not identify the atoms, but would have a right to the definite quantity; therefore it is no answer to say the money is mixed with other monies: could he have brought an action for the specific coin if offered an equal amount of good money, and he refused it? Certainly not. Besides, that argument is founded on the fact of its having been mixed; the assignees have not proved it was mixed; but even if it were proved to have been mixed with the general estate, that would be no defence. Suppose a balance existed of 4,000*l.*, to which 450*l.* was added; and then suppose 1,300*l.* paid out, is not the 450*l.* still to be accounted for? Identity is only material in disputes as to whether or not a sum constituted a part of the bulk out of or to which a party is entitled. The assignees could have informed the Court whether or not the general estate is not 450*l.* richer than it would have been but for this payment; they cannot, they do not deny it; they are therefore, in my opinion, bound to refund.

*Sir George Rose* : — This is a question of fact as to which there is some difficulty in arriving at a conclusion. But when this difficulty exists, and the question is not as

1835.

—  
*Ex parte*  
SIMPSON.  
In the matter  
of  
MABERLY.



1835.

*Ex parte*  
SIMPSON.In the matter  
of  
MABERLY.

to the personal liability of the assignees, but between the alleged owner and the estate, the former should have the benefit of the doubt. The question depends on whether *Blythe* placed the sum in question *in medio*, and whether it afterwards passed to the assignees by the order of the Court in Scotland. It is clear, that on the 3d and 4th of January the money was in the hands of *Blythe*; and his answer to the application made on the 6th shews he then had the amount in his hands. These circumstances, connected with the specific statement in the petition, that the money came to the assignees, establishes a *prima facie* case in favour of the petitioner, that *Blythe* placed the sum *in medio*. Then is there any thing in the order of the Court of Scotland showing that the assignees took the fund exempt from liability to the English creditors? there is none: that disposes of the case. The 450*l.* or its representative existed for the specific purpose of the payment of the bill, and is still charged with that trust.

Ordered as prayed. (a)

C. of R.  
June 11,  
1835.*Ex parte* LLEWELLYN.—In the matter of WIL-  
LIAMS.

New fiat issued on the petition of the same petitioning creditor before the time for opening had expired, he having been unable to prove an act of bankruptcy before, but one having been since committed.

A FIAT issued against *Williams* on the 28th day of May last on the petition of *Llewellyn*; the time for opening had not yet expired, but which would expire this day: on the 8th of June witnesses attended to prove an act of bankruptcy, but failed: since then *Williams* had executed a trust-deed, which was an act of bankruptcy.

(a) From this an appeal is now pending.



This was a petition by *Llewellyn* to annul the fiat and issue a new one.

1835.

Mr. *Koe* for the petition.

*Ex parte*  
LLEWELLYN.  
In the matter  
of  
WILLIAMS.

Ordered, without prejudice to the bankrupt's rights, the petitioner undertaking to prosecute the fiat.

*Ex parte* CHIPPENDALE.—In the matter of POT-  
TER and others.

C. of R.  
June 11,  
1835.

THE bankrupts deposited one of their title-deeds (a conveyance to trustees in trust for themselves) with the petitioner by way of equitable mortgage, leaving the other deeds in the hands of their solicitors, but not with any intent to give the latter any equitable mortgage, nor did they now claim any. This was the common petition of an equitable mortgagee.

An equitable mortgage may be created by deposit of one title-deed, where the other deeds are in the hands of the depositor's solicitors, but not as equitable mortgagees.

Mr. *Walker* for the petition.

Mr. *Teed* for the assignees. — In *ex parte* *Pearse* (a), where a party held only part of the title-deeds, it was adjudged that he had not an equitable mortgage of the estate.

Mr. *Walker* in reply: — *Ex parte* *Pearse* (a) was decided on its peculiar circumstances. The decision was on the ground that the bankrupt did not intend that either party should have an equitable mortgage. Here the intent to give an equitable mortgage is not denied.

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(a) *Ex parte* *Pearse*, *Buck*, 525.



1835.

*Ex parte*  
CHIPPENDALE.  
In the matter  
of  
POTTER  
and others.

*Per Curiam*: — This is not a case where the bankrupt splits his deeds intending to give two securities. The question here is, how the transaction affects the consciences of the bankrupts; what was their intent; what was the contract? It was to give the petitioners an equitable mortgage.

Usual order made.

C. of R.  
June 11,  
1835.

A debtor who has goods for his debt and interest, and who, at the request of the assignees, delays the sale for a better market, and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the fiat.

*Ex parte* KENSINGTON and others.—In the matter of LANCASTER.

**LANCASTER** was a merchant trading to the Brazils. The petitioners were his brokers for the sale of imports made by him to London, and were in the habit of making cash advances to him, and charging five per cent. thereon. A fiat issued against *Lancaster* on the 26th of November 1833; at the date of the fiat he was indebted to the petitioners in 41,591*l.*, for which they held as security, sugars deposited by *Lancaster* during eighteen months previous to his bankruptcy. The sale thereof had been delayed at the request of *Lancaster*, in expectation of a better market. After the bankruptcy the petitioners were induced, at the request of the assignees, to defer the sale of the whole; but after the fiat the petitioners sold parts of the sugars, and applied the proceeds, first in reduction of the interest, and then in reduction of the principal, and thereby had reduced the debt to 39,920*l.*; and by the same course they, since March 1834, had further reduced the debt to 23,926*l.* On the 27th of March 1834 the first dividend was declared; at this time a considerable quantity of sugars were in the hands of the petitioners, which, from the fluctuating state of the market, could not be valued. Between the 27th of March 1834 and the 14th of June following all the



sugars were sold, and the proceeds applied as before, whereby the debt was reduced to 7,179*l.*, which was due on the 14th of June 1834. The sum applied in reduction of interest since the 14th of June 1834 was 844*l.* A gain to the estate of upwards of 7,000*l.* accrued from the sale being delayed in manner before mentioned. The amount of proof was objected to, on the ground that the sums applied in keeping down the interest ought to have been applied in reduction of the principal: and so the commissioners decided.

This was a petition praying that the petitioners might be declared entitled to apply the sums first in payment of the interest.

Mr. *Swanston* and Mr. *Montagu* for the petition:—  
The question is, whether an equitable mortgagee is entitled in the first instance to apply monies received on account in reduction of interest? a question already decided in favour of the petitioners by *ex parte Ramsbottom*. (a) [The CHIEF JUDGE:—In that case the Court did not lay down any general rule, but thought Lord *Eldon*'s order decisive.] The decision, it is submitted, goes much further. Lord *Eldon* ordered interest up to the time of the order made by him; now, without that order the commissioners would not have given interest. Lord *Eldon*, however, thought otherwise; and this Court allowed interest accrued after the order of Lord *Eldon*. Lord *Eldon* gave interest up to a certain time; this Court gave interest beyond that time. Now, whether the decision of this Court was going further than Lord *Eldon*'s, or only carrying Lord *Eldon*'s order out to its full length, it is equally in our favour; and all that is asked here is a similar order as was made in *ex parte*

1835.

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*Ex parte*  
KENSINGTON  
and others.  
In the matter  
of  
LANCASTER.

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(a) *Ex parte Ramsbottom*, ante, page 79.



1835.

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*Ex parte*  
 KENSINGTON  
 and others.  
 In the matter  
 of  
 LANCASTER.

*Ramsbottom.* (a) But, independently of the naked rights of the petitioners, the assignees have all through acquiesced in and confirmed the mode of proceeding adopted by the petitioners, and it is now too late for them to object.

*Per Curiam* : — There can be no question as to what the general rule is, viz. that interest stops at the fiat. There are cases of exception; the question is, whether this case comes within the rule or the exception.

Mr. *Bethell* for the assignees : — The decision of the commissioners is against the present claim, and the general rule is against the demand; then particular circumstances are set up, and acquiescence by the assignees is relied on. To entitle to interest there must be a contract; that with the bankrupt cannot be carried later than the fiat, and there is no evidence of any subsequent contract with the assignees, allowing the petitioners to take interest; the affidavits merely state delay at the request of the assignees: they thereon demanded a guarantee, which we refused, and they then took on themselves the risk of delay; to our request they did not accede, and a request is nothing unless acceded to. *Cooke* (b) lays it down, that a mortgagee is only entitled to interest up to the date of the commission, and cites two manuscript cases in confirmation, *ex parte Hercy* and *ex parte Wardell*.

Mr. *Swanston*, in reply, was stopped by the Court.

The CHIEF JUDGE : —

If this were the common case of a mortgagee applying for a sale, and he asked for interest from the date of the

(a) *Ex parte Ramsbottom*, ante, page 72.

(b) *Cooke*, B. L. 195. Edit. 7.



fiat up to the order for sale, I should have no hesitation in adopting the principle of all the cases, viz. that interest stops at the date of the fiat; *ex parte Hercy* (a), *ex parte Wardell* (a), *ex parte Badger*. (b) The case of *ex parte Ramsbottom* (c) is not inconsistent with those decisions; the question there was as to rents and profits which Lord *Eldon* had given under particular circumstances, there being a claim under an indemnity, &c. The facts of the present case are peculiar. Certain factors, to whom goods are sent for sale, are entitled to sell them when they think fit. Their principal owes them a debt bearing interest, and they are entitled by contract to apply the proceeds of the goods in satisfaction or reduction of the debt and interest. At the time of the bankruptcy of their principal they held goods with these rights attaching. If they had sold the goods immediately, both themselves and the estate would have been losers, owing to the state of the market; this the assignees perceived, and applied to the factors, and requested them to postpone the sale, which they did, and afterwards sold from time to time according to the state of the market. They were cautiously sold, not disposed of injudiciously or fraudulently. The proceeds were applied, first in reduction of the interest, and then of the principal. This appears a just mode of proceeding in the particular case, which is not interfered with by any general principle of law or equity; but there is a general rule in bankruptcy which does so interfere, viz. that there is no interest after the fiat, even on securities carrying interest (till there is a surplus); and this rule even extends to mortgagees who come to this Court for assistance.

1835.

*Ex parte*  
KENSINGTON  
and others.  
In the matter  
of  
LANCASTER.

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(a) *Cooke*, B. L. 195. Edit. 7. (b) *Ex parte Badger*, 4 *Ves.* 165.

(c) *Ex parte Ramsbottom*, ante, page 72.



1835.

*Ex parte*  
KENSINGTON  
and others.  
In the matter  
of  
LANCASTER.

But in this case the petitioners do not ask the Court to interfere in their favour to order a sale. They had a pledge, which they have themselves sold; if they had sold, and *bond fide*, before the dividend, they might have deducted the value, and have proved for the residue, and there is no reason why the Court of Bankruptcy should step in to take this right from them. There being, therefore, no rule of law or equity preventing them applying the proceeds in reduction of interest subsequent to the fiat, this Court will not interfere to take away from them what they have obtained, though this Court would be prevented by the general rule in bankruptcy from assisting or sanctioning them in so doing, if it had not been already done. I do not intend to countenance the doctrine, that that may be done indirectly which cannot be done directly. My decision is founded on the peculiar circumstances of this particular case, assisted by the general rule, that where a party holds a security to cover debts in general, and some of those debts are provable and some not, the security may be applied in payment of the debts not provable.

Sir John Cross : —

These petitioners may be considered as having a security for a debt, part of which, viz. principal and interest before the fiat, is provable, and part, viz. interest since the fiat, is not provable; and he applies the security to the debt not provable.

There is nothing in the order now made which disturbs the general rule, that interest stops at the bankruptcy; the circumstances of this case take it out of that rule. The petitioners, who might have sold at any time, delayed the sale at the request of their principal, and when he became bankrupt, they in like manner suspended the sale at the request of the assignees. Before



the bankruptcy the petitioners had a clear right to interest during this delay, and must not the assignees be considered as having requested delay subject to the same condition? Otherwise, to ask delay would have been unreasonable, as then the interest on 40,000*l.* would have been a certain loss, with the chance of a further loss of the principal by any permanent fall in the market; it is clear, therefore, that the parties could not have intended delay without interest. It therefore appears that such was the intent of the parties; that such common sense requires; and that such intent is not interfered with by any rule of law or equity.

1835.

*Ex parte*  
KENSINGTON  
and others.  
In the matter  
of  
LANCASTER.

*Sir George Rose : —*

The petitioners might sell without the assistance of the assignees or of this Court. The pre-existing contract with the bankrupt, in a transaction continuing with the assignees, is itself a presumption that the assignees continued the contract. The rule that interest stops at the bankruptcy is not a rule of law nor of equity; it is the practice in bankruptcy, adopted for convenience, as any other course might lead to many difficulties. But as a matter of strict justice it may not be defensible, because, though the party cannot prove for this subsequent interest, yet is it not barred by the certificate? In all cases of indemnities interest runs after the fiat, and also in cases of decrees as to mortgages. If there were a rule of law or equity forbidding what the petitioners ask, this Court might find it difficult to give it to them; but being a rule of practice, it must bend to justice. The question is not, whether there existed a deliberate agreement with the assignees, but whether or not such a course of dealing existed as enables the Court to declare that there was an implied contract; if so, the Court next inquires, was that contract for the benefit of the estate? For the Court would not give force to such a contract,



1835.

*Ex parte*  
KENSINGTON  
and others.  
In the matter  
of  
LANCASTER.

and interfere to enable the petitioners to prove, unless the contract was beneficial to the estate.

There is sufficient on which to ground the conclusion, that such a contract existed, and that it was beneficial. It is clear the bankrupt agreed to the postponement of the sales, and consequent payment of interest; now, without negative evidence, that alone goes far to show that the assignees adopted that agreement. But the circumstance that the assignees did not insist upon the sale at the dividend meeting is conclusive; the regular mode being, when the petitioners tendered proof, to require a sale, when they would have been entitled to a dividend, and interest from the assignees if they withheld the dividend. Their not demanding the sale is evidence of their adopting the contract, of which they must be presumed to have been aware, it being a general rule of evidence to presume knowledge under such circumstances.

Ordered as prayed. Costs of both parties out of estate, the Chief Judge *dissentiente*.

C. of R.  
June 12,  
1835.

In 1825 an assignment from the provisional assignees to the assignees was prepared, but, through neglect of the solicitor, never executed. The provisional assignment was ordered to be vacated, and a

new assignment executed by the commissioners.

It seems the 25th section of 1 & 2 W. 4, c. 56, does not apply to such a case.

The solicitor having been paid for the assignment must refund.

*Ex parte* BENNETT and another, assignees. — In the matter of STEPHENS.

**STEPHENS** being entitled, after the death of his wife, to a life estate in certain stock, became bankrupt in 1825, and a provisional assignment was made to *Page* and *Farmer*. The petitioners having been chosen assignees, a regular assignment to them from *Page* and *Farmer* was prepared; it purported to bear date December 1825, but was never executed by the provisional assignees. The solicitor charged in his bill 12*l.* for the



expenses thereof. The wife of the bankrupt died in 1833, and thereupon the bankrupt's life interest falling into possession, was put up for sale by the assignees and bought. The purchaser discovering that the conveyance had never been executed by the provisional assignees, refused to complete his purchase. The assignees applied to the solicitor to procure the execution of the assignment to them, or to take some other steps in the matter, which not having been done, this petition was presented by the assignees, praying that the provisional assignment might be vacated, and that the solicitor might pay all costs and expenses.

1835.

*Ex parte*  
BENNETT  
and another.  
In the matter  
of  
STEPHENS.

Mr. *Montagu*, for the petition, submitted that a new choice was proper, when the estate would vest in the new assignees by virtue of their appointment; *Smith v. De Tastet*. (a)

Mr. *O. Anderdon* for the solicitor: — The solicitor submitted to any order the Court might make, except that he ought not to be ordered to pay the costs. It might indeed be questioned whether the Court had any jurisdiction over the solicitor; besides which, the statute of limitations had run as against him; and if the remedy exist, it is at law, not here; *Frankland v. Lewis*. (b) But the solicitor acts here merely as agent to the assignees, not as solicitor to the fiat, — not as officer to the Court; he has done nothing which could be construed into a contempt of Court. Even if there were formerly jurisdiction in the Lord Chancellor, yet this Court has it not. The words of 1 & 2 W. 4, c. 56, s. 16, are “ That all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under such commissions, or to the

(a) *Smith v. De Tastet*, 1 Mont. & Ayr. 370.

(b) *Frankland v. Lewis*, 4 Sim. 586.



1835.

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*Ex parte*  
 BENNETT  
 and another.  
 In the matter  
 of  
 STEPHENS.

subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, *and to fiats issued* in pursuance thereof," &c. This clause applies then, not to commissions already issued, but to "fiats issued in pursuance" of that act; therefore this Court has no jurisdiction as to by-gone transactions under commissions issued before the 1 & 2 W. 4, c. 56.

Mr. *Montagu* in reply was stopped by the Court.

The solicitor to the fiat must bear any expense which his neglect would cause the estate.

The CHIEF JUDGE:—

Though the solicitor submits to any order the Court may think fit to make, yet I should not feel disposed to take advantage of that by making an order which, but for that submission, could not be enforced. But it is clear the Court has jurisdiction. The solicitor to the commission has prepared the assignment from the provisional assignees to the assignees, but has not procured it to be executed. He has acted as if it had been executed, has charged attendance to procure execution, and prepared the conditions of sale; he has therefore rendered himself responsible, and it is the duty of the Court to see that the estate does not suffer from the conduct of one of its officers. The jurisdiction of this Court over its solicitors does not depend on the 16th section of 1 & 2 W. 4, c. 56, but on the 2d section, which invests this Court with all the jurisdiction of the Great Seal in bankruptcy. When any neglect of a solicitor to a fiat would induce expense to the estate, he must bear it.

The proper order would be, to order a new choice of assignees, when the estate in question will vest in them by virtue of their appointment (a); but, probably, the

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(a) *Smith v. De Tastet*, 1 Mont. & Ayr. 370.



solicitor will take other steps to procure the execution of the assignment, so as to render that course unnecessary. The costs of this petition, and of any proceedings had to set the matter right, must be paid by the solicitor.

1835.

*Ex parte*  
BENNETT  
and another.  
In the matter  
of  
STEPHENS.

Sir *John Cross* : — I am surprized to hear it suggested that the Court has no jurisdiction. The arguments that this is a case for damages at law, and as to the statute of limitations, are not applicable. The Court clearly has jurisdiction to order the assignment to be vacated, or to order a new choice of assignees. Then who is to bear the costs? Why, the person whose conduct renders those steps necessary; the thing is a mere oversight of the solicitor, and only blameable as such, but he must bear the costs.

Sir *George Rose* : — I think that the argument of Mr. *Anderdon*, that this is a question of damages at law, would be good as to that portion of the prayer of this petition which asks that the solicitor may pay all the costs, charges, and expenses incurred or to be incurred by the petitioners in endeavouring to procure the execution of the assignment, and otherwise to arise in the completion of the sale, &c.; that is a question of damages, over which the Court has no jurisdiction; but this Court has jurisdiction to set the estate right as to other expenses. In this case the Court not only acts on its general jurisdiction over its solicitors, but on its particular jurisdiction over the clerk to the commission, who has a special duty to perform in procuring the execution of the assignment to the assignees.

*Per Curiam* : — The assignments must be vacated at the costs of the solicitor, who must pay the costs of this petition, and refund the 12*l*.



1835.

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*Ex parte*  
BENNETT  
and another.  
In the matter  
of  
STEPHENS.

Mr. O. Anderdon : — The Court makes an order as to refunding the 12*l.*, which was not asked at the bar, and as to which I have not been heard. If the solicitor procures the assignment to be executed, and thereby sets the matter right, he ought to be allowed to retain the 12*l.* Besides, the length of time elapsed is a bar to his being called on to refund the 12*l.*

*Per Curiam* : —

If the solicitor pays the expenses of the new assignment the Court will not insist on his refunding the 12*l.* The statute of limitations is no bar to a claim against the solicitor for money belonging to the estate improperly in his hands; if he received it for work not done, it still belongs to the estate.

The strict method of proceeding in this case would be to nullify all acts ineffectually or improperly done, and on that footing the 12*l.* must be refunded. If the same end can be procured by a new assignment, it might be allowed on consent, but the Court cannot so order. The order to vacate the assignment should therefore be made: but by consent, and as matter of favour, the drawing up may be suspended to enable the solicitor to set matters right, when he may retain the 12*l.* It appears doubtful whether merely vacating the provisional assignment would be sufficient, it not being clear that the 25th section is retrospective, so as to vest the estate in the present assignees without a conveyance.

The order finally made was, that the assignments in the petition mentioned be vacated if the assignees desire, and that the costs of vacating the provisional assignment, and of preparing and executing the new assignment from the commissioners, and of this petition (and incidental thereto if necessary), be paid by the solicitor.



REX v. FAULKNER.

SIR WILLIAM FOLLETT moved, on behalf of Mr. *Faulkner*, of the firm of *Adlington, Gregory, Faulkner, and Co.*, for a rule to show cause why a sum of 10*l.*, paid by him into the Exchequer, in discharge of a fine to that amount imposed upon him by Mr. *Fane*, one of the commissioners of the Court of Bankruptcy, for contempt of Court, should not be returned. The alleged contempt consisted in writing and sending to the commissioner a letter, which referred to expressions made use of by him at an audit meeting held before him, in the matter of *Kensington*, a bankrupt, touching the propriety of a demand made by Messrs. *Adlington and Co.* to deduct their bill of charges against a Mr. *Jones* out of the purchase money to be paid by him for part of the bankrupt's estate. Messrs. *Adlington and Co.* were also solicitors to the estate.

C. of Ex-  
CHEQUER,  
*June 13,*  
1835.

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tempt.

See 5 & 6  
W. 4, c. 29,  
s. 25.

Sir *William Follett* having obtained his rule, and the rule having been served upon the solicitor to the treasury, the Attorney General (Sir *John Campbell*) and Mr. *Richards* now showed cause on behalf of the Crown.

The Attorney General stated the circumstances which preceded the imposition of the fine. These circumstances are not inserted; *First*, because it is a mere question of law, on which the circumstances would not have any influence, as, if the commissioner had power to fine, the propriety of his act seems not to be examinable in any other court of justice; and if he had not, his act was void. *Secondly*, because all the evidence was in its nature *ex parte*, and the commissioner did not and could not interfere, by making any affidavit in contradiction.



1835.  
—  
REX  
v.  
FAULKNER.

*Thirdly*, because the circumstances had not any influence on the judgment of the Court. But as these reasons may not be satisfactory to the profession, the written address by the commissioner on imposing the fine, the letter, and the substance of the affidavits, will be found in the Appendix.

The Attorney General and Mr. *Richards* : —

The question is, whether the Court of Review, and the Subdivision Courts, and the commissioners sitting singly in the discharge of their duty, have a power to fine for contempt.

Of course (as was intimated by this Court when the case was moved) this Court has generally no jurisdiction to inquire into the amount of a fine, or whether it was properly imposed, supposing the power to impose a fine to exist ; an exception to which rule exists where a fine is set in a court leet ; there it may be removed by *certiorari* : as in a case lately, where, in a court leet of Sir *Oswald Moseley*, a gentleman was fined 300*L*. for refusing to take upon himself the office of constable ; this Court ordered it to be brought up by *certiorari*, and intimated a clear opinion that the fine was excessive. But there can be no doubt as to the rule of law upon this subject, upon which there are many decisions, and that such an inferior court, or any superior court of record, or not of record, has a clear jurisdiction to fine, and that no other court by way of review can inquire into the manner in which the power is exercised.

With regard to the power of superior courts not of record to fine, the cases are collected in *Viner's* Abridgment, title "Contempt," and there is one where disrespectful words were spoken of the Master of the Rolls by a party served with an order ; the Master ordered an



attachment to issue, and said, that he believed the Lord Keeper would have committed him.

Sir *W. Follett*, in moving the rule, relied upon what we fully admit, that commissioners under the 6 Geo. 4, and the acts preceding it, had no such power. A contempt offered to the commissioner was considered as offered to the Great Seal, and was cognizable only by the Lord Chancellor (*a*); but the words of this act remedy the deficiency. (*b*) The question is as to the power of fining, which is virtually the same as the power of imprisoning: we do not contend that there is any distinction; but the question is as to the power to fine for contempt, and not as to the power of imprisoning until satisfactory answers are given by a prevaricating witness.

The scheme of the act of parliament seems to have been to create what is called a Court of Bankruptcy, consisting of several limbs or branches; that is, the Court of Review, — the Subdivision Courts, — and the Commissioners acting singly.

By the first (*b*) section a court of judicature is established, called the Court of Bankruptcy, and certain per-

1835.

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 REX  
 v.  
 FAULKNER.

(*a*) *Anon. Molloy*, 103, & 2 *Eq. Abr.* 98; *ex parte Titner*, 1 *Atk.* 136; *ex parte Dixon*, 8 *Ves.* 104; *ex parte Page*, 17 *Ves.* 60.

(*b*) "That it shall and may be lawful for His Majesty, His heirs and successors, by charter or letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and establish a court of judicature, which shall be called "The Court of Bankruptcy," and by a commission under the Great Seal to appoint one person, being

a serjeant or a barrister at law of not less than ten years standing, to be the chief judge of the said court, and three persons, being serjeants or barristers at law of not less than ten years standing at the bar, or of five years standing at the bar having previously practised five years as a special pleader below the bar, to be other judges of the said court, and six persons, being barristers at law of not less than seven years standing at the bar, or of four years standing at the bar



1835.

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 Rex  
 v.  
 FAULKNER.

sons are to be appointed judges “ of the said court,” and certain other persons commissioners “ of the said court.” “ The Court of Bankruptcy” is the *nomen generale*, comprehending all the divisions; “ and the same court,” (this is not the Court of Review or the Subdivision Court, but the Court of Bankruptcy,) “ and every judge and commissioner thereof, (and Mr. Fane is a commissioner when he is sitting as commissioner,) is to have, use, and exercise all the rights, incidents, and privileges of a court of record.” It was contended, when the rule was moved, that these last words of the section put a limit upon it, and that the commissioner was to have only the same powers which a judge of a court of record, not exercising his judicial functions, would have. Now a judge sitting at chambers, and exercising particular functions under an act of parliament, is entitled to fine and imprison for contempt, just as a single judge sitting in the Bail Court in the King’s Bench, or a judge sitting at Nisi Prius; so too where an application is made under the Habeas Corpus Act, or where a judge is exercising at chambers the duties imposed by a late act of parliament. As to the power of a judge sitting at Nisi Prius to fine and commit, that is a power which has been exercised by Lord *Wynford*, who, during the same address, fined a defendant three times, and upon its being brought before the Court

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having previously practised as a special pleader for three years below the bar, to be called commissioners of the said court; and the same court shall be and constitute a court of law and equity, and shall, together with every judge and commissioner thereof, have, use, and exercise all the rights, incidents, and privileges of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of His Majesty’s courts of law or judges at Westminster.”—1 & 2 W. 4, c. 56, s. 1.



above it was held he was fully justified; and Mr. Justice *Coleridge*, too, committed a gentleman three days for contempt. The cases upon the subject are collected in the *King v. Clements* (a). But whatever doubt exists respecting the power of a judge sitting at chambers to fine and imprison, that can only arise from its being doubtful whether he then constitutes a court of record; and that the commissioner is constituted a court of record by the first section will appear more clearly by referring to the second section (b), which creates the Court of Review, and we shall show that the first section, which constitutes the Court of Review a court of record, applies equally to the Subdivision Courts and to the single commissioner. Now "the said judges, or any three of them, shall and may form a Court of Review." The first question arising is, How are the three or four judges administering the bankrupt laws a court of record? Why, by virtue of the first section, which says "the same court;" this is not the Court of Review, but the Court of Bankruptcy, which is "to have, use, and exercise the privileges of a court of record."

1835.

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 REX  
v.  
FAULKNER.

(a) 4 *Barn. & Ald.* 216; 11 *Price*, 68.

(b) "And be it enacted, that the said judges or any three of them shall and may form a Court of Review, which shall always sit in public, save and except as may be otherwise directed by this act or by the rules and regulations to be made in pursuance hereof, and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow all such matters in bank-

ruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided; and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act or may be by the said rules and regulations assigned and referred to the said Court of Review."—1 & 2 W.4, c. 56, s. 2.



1835.  
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 REX  
 v.  
 FAULKNER.

[Mr. Baron *Parke* : — There is one point to be considered, whether by the second section the power of committing for contempt to one of the commissioners was not before in the Lord Chancellor. In the *King v. Almon* (a) Lord Chief Justice *Willes* says, “The Court of Chancery have always punished the abuses of their masters or commissioners of bankrupt, while acting in the execution of their offices, in this summary manner by attachment.” May not the second section be construed by implication to give the Court of Review the same power of punishing for a contempt of the commissioner which the Lord Chancellor exercised before the act.]

The second section (b) transfers from the jurisdiction of the Lord Chancellor all those matters which he was in the habit of deciding. Suppose the second section stood alone, and the first section not to have created any court of record, the second section would not make the Court of Review a court of record; it merely delegates to them a power specially pointed out to hear, determine, and allow all such matters as now usually are brought before the Lord Chancellor. [Mr. Baron *Alderson* : — If you look at the fourth section (c) you will see the Court of Review has specially given to it the powers of a court of record.]

That is merely giving them the power to issue at-

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(a) 5 *Burr.* 2086.

(b) *Ante*, page 315.

(c) “And be it enacted, that it shall be lawful for the said Court of Review to direct any issue of fact arising therein to be tried by a jury before one of the judges thereof or before a judge of assize, and to issue process to

compel the attendance of jurors and witnesses, and to enforce the orders and decrees of the said Court of Review, and to that end to exercise all the powers vested for such purpose in any of his Majesty’s courts of record at Westminster.”—1 & 2 W. 4, c. 56, s. 4.



tachments; not of fining and imprisoning. Although it might be a court of record, it would not have power to issue all sorts of processes which are issued by the different courts of equity. As to the point, whether the commissioner sitting singly is a court of record, there is no decision upon it, except in *ex parte Lampon* (a), where it incidentally occurred, and where Lord Brougham, who framed the act, treated the commissioners as judges of record. [Mr. Baron Alderson:—Lord Brougham's judgment proceeds on the supposition that each of the commissioners was aiding in a Subdivision Court.] We contend, that unless each commissioner be himself a court of record the Subdivision Court is not. [Lord Abinger:—Lord Brougham thought they were judges of record, but required affidavits to contradict them; this seems a little inconsistent.] It is the first section then which confers upon the Court of Review the privileges of a court of record, as a limb of the Court of Bankruptcy; and if so, there is no reason for applying it individually to the Court of Review, but it must apply equally to the Subdivision Courts and the single commissioner. [Lord Abinger:—It seems the whole body is to form one court by the first clause, and it gives each judge and commissioner all the rights and incidents of a court of record. It does not make each judge a court, but gives each judge the same power which a judge of a court of record would have.] It makes each judge a court of record, just as the Master of the Rolls is a court, and the Lord Chancellor is a court. [Lord Abinger:—Nobody doubts that the Lord Chancellor is a court, and the Master of the Rolls is a court. I do not see by this act how that one court is to exercise its functions.] The four judges and six commissioners never act jointly.

1835.

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 REX  
 v.  
 FAULKNER.

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(a) *Ex parte Lampon*, 1 Mont. & Agr. 245.



1835.

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 REX

v.

FAULKNER.

[Lord *Abinger* : — And yet the declaration “ they are to be a court of record ” is applicable to the whole assemblage.]

No, my Lord; it goes on to say, “ and the same court,” that is, made a court of record, “ and every judge and commissioner thereof shall have, use, and exercise the rights, incidents, and privileges of a court of record.”

We now come to the Subdivision Court created by section 6. (a) As the powers of the Court of Review must be drawn out of the first section, all the arguments which prove the Court of Review a court of record apply with equal force to show the Subdivision Court is a court of record, because the six commissioners may be formed into two courts, consisting of three commissioners, by the sixth section. But if the Subdivision Court has a power to fine and commit for contempt, the single commissioner must have the same power, for by the seventh section (b) the single commissioner may

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(a) “ And be it enacted, that the said six commissioners may be formed into two Subdivision Courts, consisting of three commissioners for each court, for hearing and determining the matters and things, and making the examinations herein-after referred thereto; and all references or adjournments by a single commissioner to a Subdivision Court, by virtue of this act, shall be to the Subdivision Court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such Subdivision Court, or other sufficient cause, shall think fit otherwise to direct; and the said Subdivision

Courts may sit either in public or private, as they shall see fit, unless when it shall be otherwise provided by this act, or by the rules to be made as herein-after mentioned.”—1&2 W.4, c.56, s.6.

(b) “ And be it enacted, that in every bankruptcy prosecuted in the said Court of Bankruptcy it shall and may be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any act or acts of parliament now in force vested in commissioners of bankrupt, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the



have, perform, and execute precisely the same powers, duties, and authorities as the Subdivision Court. The words of the act are, "any one or more of the said six commissioners." The latter part of the seventh section was relied upon, when the rule was moved for, by which the power to commit is transferred from the commissioner to the Subdivision Court; but that section does not relate to a committal for contempt; it gives power not incident to a court of record,—a power to commit, not for refusing to answer this or that particular question, but for not answering to the satisfaction of the party committing. The Court of Exchequer and the other superior courts have no power to commit a person till he answers to their satisfaction. They may fine for contempt or any thing impeaching their dignity, but they have no authority to exercise that special power, given from necessity, for the purpose of discovering the bankrupt's property. Section 8 is important, by which the same oath is prescribed to the judges and commissioners. Section 10 (a) is material, as it respects attorneys and

1835.

—  
**REX**  
**v.**  
**FAULKNER.**

purpose by a separate commission under the Great Seal of the United Kingdom of Great Britain and Ireland: provided always, that no single commissioner shall have power to commit any bankrupt or other person examined before him, otherwise than to the care and custody of the messenger or other officer of the said court, to be by him detained in his custody, and brought up before a Subdivision Court or the Court of Review within three days after such commitment, for which purpose one of such courts shall be forthwith assembled."—  
 1 & 2 W. 4, c. 56, s. 7.

(a) "And be it enacted, that all attorneys and solicitors of any of the superior courts of law or equity at Westminster may be admitted, and have their names enrolled in the said Court of Bankruptcy, without any fee or charge other than such as shall be allowed by this act or any rule or regulation to be made in pursuance thereof, and may appear and plead in any proceedings in the said court without being required to employ counsel (except in proceedings before the said Court of Review and upon the trial of issues by jury); and in case any person, not being an



1835.

—  
 REX  
 v.  
 FAULKNER.

solicitors who may be enrolled in the Court of Bankruptcy; that is, not the Court of Review or Subdivision Court, but the general Court of Bankruptcy. Let us suppose the case, contemplated by the 10th section, of a person not duly admitted, practising before one of the commissioners; would he not be practising in the Court of Bankruptcy, just as much as if he were practising in the Court of Review? and therefore whenever any of these ten functionaries are exercising the powers bestowed upon them by the act they constitute a court of record.

[Lord *Abinger* : — Let me call your attention to this tenth section. I apprehend that none but attorneys and solicitors could practise, and any stranger intervening and insisting to practise would be guilty of contempt without that declaration; and yet that is a species of contempt which the actual court or branch of the court before whom the contempt is committed cannot punish. Here is a clear case of contempt, which the legislature appears to have thought no court could punish, and which they specially gave the Court of Review a power of punishing.]

The fact of an attorney of the Common Pleas practising in the Court of Exchequer would not of necessity amount to a contempt. [Lord *Abinger* : — A man insisting to practise.] That is not the clause. [Lord *Abinger* : — I will not question that it is made a contempt; how is it punished?]

It is a contempt *de novo*, and there is a special remedy

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<p>attorney or solicitor duly admitted as aforesaid, shall practise in the said Court of Bankruptcy as an attorney or solicitor, he shall be deemed guilty of a contempt of the said court, and be liable to all the penalties incident thereto, on complaint thereof</p>	<p>made to the Court of Review; and that all the laws and statutes now in force concerning attorneys and solicitors shall extend to attorneys and solicitors practising in the said Court of Bankruptcy."—1 &amp; 2 W. 4, c. 56, s. 10.</p>
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provided for it; this section mentions any person practising in the Court of Bankruptcy:—where is the Court of Bankruptcy?

[Lord *Abinger* : — I know where the Court of Review is, and where the Court of Commissioners is, but the Court of Bankruptcy seems the only Court that does not sit. Not only does that Court never sit, if you consider all the commissioners as forming a Court of Bankruptcy, but it never can sit, because the powers of the commissioners are inconsistent with the powers of the Court of Review.]

The Court of Review sits on appeal from the commissioners, and there are particular jurisdictions pointed out; and the legislature must have passed this tenth section to mean nothing, if it is held that no contempt is committed under the clause, unless a party practises without being admitted in the Court of Bankruptcy, when the Court of Bankruptcy cannot by possibility exist. Unless, too, each commissioner is a court of record it does not appear how the contempt provided for in the 10th section is to be met. [Lord *Abinger* : — Does he carry about the virtues of a court of record with him wherever he goes?] He carries about the powers of a court of record as a judge upon the circuit, who whenever he is sitting in the execution of his duty as a judge is a court of record. [Lord *Abinger* : — Then, if he had received that letter, not sitting in Court, it would not have amounted to a contempt.] An insulting letter, addressed to a judge, touching a matter then under consideration, threatening or endeavouring — [Lord *Abinger* : — I can only say, that if I received such a letter I should not consider myself at liberty to commit him. Mr. Baron *Alderson* : — There would be a great many committals if such a course were pursued by the judges. Lord *Abinger* : —

1835.

—  
REX

v.

FAULKNER.



1835. Do you mean to say, that one of the judges has the power to fine a man for sending him a silly letter or an impudent letter about any matter that he has decided? I can only say I should be very much afraid of exercising it.] There can be no doubt, that if any person wrote a letter of this sort to a judge, couched in as offensive terms as this letter, he would, upon his coming into court, and acknowledging it, be guilty of a contempt. [Mr. Baron *Alderson* :—The essence of this power is, that it is not to be questioned, and, therefore, we must look carefully to see whether the legislature has given a power over which there is no control. Lord *Abinger* :—It ought to be conferred in clear and unambiguous words. Mr. Baron *Parke* :—The strength of the argument on your side appears to me to be this :—If you look at the first section of the act, it is clear the Court, under certain circumstances, is to be a court of record : it is equally clear, each and every commissioner is to have, in some cases, the powers of a judge of a court of record ; if he has in some cases, what cases can they be, except those in which he is acting, under the powers of the statute, by himself ; and therefore you would say, if he is acting in administering the fiat he must be a judge of record ; what others can it refer to but that? Sir *William Follett* :—It is not a judge of record, but a judge of a court of record. Mr. Baron *Alderson* :—The insult may be to the individual forming a member of the Court.] In section 11 (a) the distinction is again recognized, between

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(a) "That the judges of the said Court of Review, with the consent of the Lord Chancellor, shall have power from time to time to make general rules and orders for regulating the practice of the said Court of Bankruptcy, the sittings of the judges and commissioners thereof, and the conduct of the other officers and practitioners thereof." — 1 & 2 W. 4, c. 56, s. 11.



the Court of Bankruptcy, and the Court of Review; and the Court of Review is empowered to make regulations for the Court of Bankruptcy; not only for itself, but the Subdivision Courts and the commissioners; and all the proceedings in the Court of Review, and the proceedings before each commissioner, in the printed form, are always headed "In the Court of Bankruptcy," each commissioner being a Court of Bankruptcy. [Sir *William Follitt*:—They make a distinction; they say "The Court of Commissioners." In the printed form it is, "In the Court of Bankruptcy; appointment of official assignees at the Court of Commissioners of Bankrupt, Basinghall-street." Mr. Baron *Parke*:—That is the locality; "In the Court of Bankruptcy" is the heading. In the estreat of the fine I do not find any Court of Commissioners.] By the 12th section (a), the fiat is to issue under the hand of the Lord Chancellor, thereby authorizing the

1835.

—  
 REX  
 v.  
 FAULKNER.

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(a) "And be it enacted, that in every case wherein the Lord Chancellor, by virtue of any former act, hath power to issue a commission of bankrupt under the Great Seal, it shall and may be lawful for him, and also for the Master of the Rolls, the Vice-Chancellor, and each of the Masters of the Court of Chancery acting under any appointment by the Lord Chancellor to be given for that purpose, on petition made to the Lord Chancellor against any trader having committed any act of bankruptcy by any creditor of such trader, and upon his filing such affidavit and giving such bond as is by law required, to issue his fiat under his hand in lieu of such commission, thereby authorizing such creditor to prosecute his said complaint in the said Court of Bankruptcy, or to prosecute the same elsewhere before such discreet and proper persons as the Lord Chancellor, or as the Master of the Rolls, Vice-Chancellor, or one of the Masters of the Court of Chancery acting as aforesaid, by such fiat may think fit to nominate and appoint; and that the persons so appointed shall thereby have the like power and authority, to all intents and purposes, as if they were assigned and appointed special commissioners by virtue of a commission under the Great Seal."—1 & 2 W. 4, c. 56, s. 12.



1835.

—  
 REX  
 v.  
 FAULKNER.

creditor to pursue his complaint in the Court of Bankruptcy; but how is it prosecuted? before the single commissioner. Does not this show, that the commissioner so prosecuting the fiat is the Court of Bankruptcy, and is entitled to have all the privileges and immunities of the Court of Bankruptcy; and, by the 13th section (a), every fiat prosecuted in the said Court of Bankruptcy is to be filed and entered of record in the said Court; and shall thenceforth be a record of the said Court. My Lord *Abinger* inquired whether the proceeding was of record; and, by this section, every commissioner is armed with the power of proceeding in the execution of the fiat as soon as it shall be entered of record. The 12th section says, the fiat is to be prosecuted in the Court of Bankruptcy, and yet the commissioner is the person who is to work it; how can we reconcile the two sections, unless for this purpose the commissioner is treated as the Court of Bankruptcy.

Section 14 (b) is material, as it takes the distinction

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(a) “ And be it enacted, that every such fiat, prosecuted in the said Court of Bankruptcy, shall be filed and entered of record of the said Court, and shall thenceforth be a record of the said Court; and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners acting in the execution of a commission of bankrupt, save and except as such proceeding may be altered by this act.”—  
 1 & 2 W. 4, c. 56, s. 13.

(b) “ And be it enacted, that the judges who go the several circuits in England and Wales may be directed by the Lord Chancellor from time to time to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attorneys practising in the counties to the said circuits belonging, and upon such persons being returned, and approved by the Lord Chancellor, the fiat or fiats aforesaid not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt, according to the districts or places for which such persons shall be so returned, and to no



between these six commissioners and commissioners appointed in the country, and between fiats directed to the Court of Bankruptcy and other fiats. Those persons to whom country fiats are directed, do not come within the first section, and they have no more power than commissioners under the old act.

Section 21 (*a*) is in point, because by the constitution of this Court the judges who take rank and precedence after the judges of the superior courts at Westminster may be required to act as commissioners; and they of course would have the same powers, and not greater, than the other commissioners. This takes away the notion that there is any improbability in the legislature conferring the power contended for upon the commissioners, as an equality is here recognized between the commissioners and those high functionaries. Section 30 (*b*) is the only remaining section which throws

1835.

—  
REX  
v.  
FAULKNER.

other persons than such as shall be included in such return: provided always, that it shall be lawful for the Lord Chancellor at any time to remove any person from the lists to be so returned, for such cause as to him shall seem fit."—1 & 2 W. 4, c. 56, s. 14.

(*a*) "And be it enacted, that in all cases in which power is by this act given to any one of the said commissioners to act, such power shall and may in like manner be exercised by the said chief judge, or by any one of the said other judges, as occasion may require; and where any such judge so acting would, in case he were a commissioner,

make any reference or adjournment to a Subdivision Court, such reference or adjournment shall be made by such judge to the Court of Review instead of to a Subdivision Court."—1 & 2 W. 4, c. 56, s. 21.

(*b*) "And be it enacted, that any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a Subdivision Court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a Subdivision Court; which said Court shall proceed with such last-mentioned examination and finally, and without any ap-



1835.

—  
REX

v.

FAULKNER.

any light upon the subject. By section 38 (a) it is provided that the said judges or commissioners, placing them upon the same footing, shall have power to take either the whole or any part of the evidence either *vivā voce* on oath or upon affidavit, as the said Court may direct. Now, what is the meaning of the said "Court" in this section? It means the Court of Review, or the Subdivision Court, or the single commissioner. Is it necessary he should call a Court of Review or Subdivision Court before he can receive evidence *vivā voce* or upon affidavit? [Mr. Baron *Alderson*:—It is by a general rule to be made by virtue of the act.] The words are, "in any case direct," which would not require a general rule. [Mr. Baron *Alderson*:—Are not the words applicable to both?] There may be a general rule made by the Lord Chancellor, or by

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peal, except upon matter of law or equity, or of the refusal or the admission of evidence, shall determine upon such proof of debts: provided always, that in case, before the said commissioner or Subdivision Court, both parties, the assignees or the major part of them, and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or Subdivision Court, and sent for trial before the chief judge or one or more of the other judges; and if one party only applies for such issue, the said commissioner or Subdivision Court shall decide whether or not such trial shall be

had, subject to an appeal as to such decision to the Court of Review."—1 & 2 W. 4, c. 56, s. 30.

(a) "And be it enacted, that the said judges and commissioners of the said Court of Bankruptcy shall in all matters within their respective jurisdictions have power to take the whole or any part of the evidence either *vivā voce* on oath, or upon affidavits to be sworn before one of the said judges or commissioners, or a master, ordinary or extraordinary, in Chancery, as the said Court may in any case direct, or as the Lord Chancellor may from time to time prescribe, by any general rule to be made by virtue of this act."—1 & 2 W. 4, c. 56, s. 38.



the Court; that is, as the Court of Review: the Sub-division Court, or the single commissioner, may in any case direct. [Mr. Baron *Alderson* :— The judges of the Court of Review, with the consent of the Lord Chancellor, have power to make general rules. It means the Court consisting of the Court of Review with the authority of the Lord Chancellor.] That is one interpretation; but the other is, that the examination shall be *viva voce* or on affidavit, according to the discretion to be exercised in any particular case, or according to the general rule to be made by virtue of the act, by the Lord Chancellor. [Mr. Baron *Alderson* :— One of the judges may sit to try an issue by himself; the question might arise whether he would have the power.] If he would not by himself, the issue may be directed to be tried before a judge of Assize. [Mr. Baron *Alderson* :— It is not before the Court of Review, but a judge of the Court of Review.] That judge is to have all the rights and immunities of a judge of record of the superior courts; he is exactly placed in the same situation as a judge sitting at *Nisi prius*. The power cannot be confined to the Court of Review; three of the judges must be sitting. It is not denied that it belongs to the Court of Review when the three judges are sitting; and the instance put shows it must be extended to the case where one of the judges is sitting.

[Mr. Baron *Parke* :— There is a power (a), I observe,

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(a) “ And be it enacted, that if the assignees of any bankrupt’s estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such

1835.

—  
REX  
v.

FAULKNER.



1835.

—  
 Rex  
 v.  
 FAULKNER.

given to the assignees to refer any matter in question to be made a rule of the Court of Bankruptcy; there is the same power given to enforce this rule as to the superior courts at Westminster and other courts of record. Supposing there is a disobedience to the award; who is to enforce the rule? or that it is desirable to have papers or books produced before the referee; what course is to be pursued?]

If the matter is pending before the Court of Review it is to be enforced by the Court of Review. [Lord *Abinger*: — The assignees may refer without the authority of the Court, but the reference is to be made a rule of Court; what Court?] We must presume the Court of Review, as being the highest department. Whatever is done by any of these functionaries is supposed to be done by the Court of Bankruptcy. The powers of the Court of Bankruptcy are vested in particular members of the Court, who do the particular duty; and it is observable that they all are employed in the same object, the prosecution of the fiat. The one is merely an appeal from the other, the commissioner deciding every thing by his own authority that may be decided ultimately by the Court of Review. He is now no longer a mere *delegatus* of the Great Seal; he acts by virtue of his appointment from the Crown; and when we find the Court of Bankruptcy composed of these different members, and that it never can sit, the Court of Review being the court of appeal from the commissioners, a reasonable construction must be given to the act; and construing the first section by the aid

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reference so made a rule of the said Court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at	present accrue upon any submission of reference made a rule of any of His Majesty's other courts of record."—1 & 2 W. 4, c. 56, s. 43.
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derived from the others, no other conclusion can be arrived at than that it was the clear intention of the legislature that each commissioner should of himself form a court of record.

1835.

—  
**REX**  
*v.*  
**FAULKNER.**

Sir *William Follett*, Mr. *Wightman*, and Mr. *Cowling*, in support of the rule : —

In support of the rule it is necessary to call the attention of the Court to the nature of the alleged contempt, as the sending this letter cannot, under any construction of the act, be considered a contempt; and supposing the Attorney General is right, that a contempt in the face of the Court is a contempt for which a judge may commit, a judge has no right to commit when he is not in court. [Mr. Baron *Parke* : — We cannot enter into that; the only question for our consideration is, whether the individual commissioner is entitled to fine for contempt.] In every case in which these matters are brought before the Court it is necessary to look at the peculiar nature of it; and if the Court should be of opinion that the commissioner has power to commit for a contempt before him, obstructing the course of justice, we contend that he has not the power to commit for a letter written to him, whether reflecting on him in the character of judge or any thing else.

[Lord *Abinger* : — Supposing a judge sitting at Nisi Prius, where it is admitted he constitutes a court of record, were to receive a private letter containing matters offensive to him, could he immediately order the clerk in the Court, or the associate, to enter that he fined the writer ?]

Certainly not; and, for this reason, we contend we are at liberty to draw the attention of the Court to the circumstances. The contempt complained of here is not so strong as the case put by Lord *Abinger* : this



1835.  
 —  
 Rex  
 v.  
 FAULKNER.

letter does not do it in point of fact. The Attorney General took the same view of it, that unless that letter were a contempt in the face of the Court he could not argue that the commissioner had a right to commit. It must be something to impede the course of business. Great stress was laid upon the circumstance that the letter was delivered to Mr. *Fane* whilst he was sitting in the character of commissioner. The fact is, the letter was written and delivered to Mr. *Fane* in the evening. [Mr. Baron *Parke* : — The *King v. Almon* (a) was for a libel on Lord *Mansfield*, not in the face of the Court, and punished by attachment.] There was no judgment in that case, and it is the only one in which the attempt was ever made. There is a case in *Croke's Reports*, when the judges were not so chary of liberty as they are now. [Mr. Baron *Parke* : — The *King v. Clements* (b) was not an obstruction in the face of the Court; but put entirely on the ground that it was an obstruction to the proceedings, the Court having directed that the proceedings should not be published while the trial was going on, the parties having published the evidence. In the case in *Croke* there was a gross libel on Sir *Edward Coke*. Does not an intemperate and abusive letter to a judge, in respect of the judgment he has pronounced, obstruct the proceedings of the Court?]

If so, it is extending the rule further than it has ever been done before. We contend, too, that summoning a party as a witness, and interrogating him upon oath as to the authorship of a letter, and then proceeding to inflict a penalty, is not the proper mode of imposing a fine or of imprisoning, and that no judge of any court of record has the power of doing it; and, if it became

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(a) 5 *Burr.* 2686.

(b) 4 *Barn. & Ald.* 218.



important, we should submit that, taking the case of a judge sitting at Nisi Prius, and the same occurrence to have taken place, he would have no power to commit ; and that is taking the broadest case, because the judge sitting at Nisi Prius is a court of record ; and as for a letter written in answer to a message from him, it is clear he could not have had the party up three weeks or a month afterwards, and have committed him. The next point is, whether commissioners of bankrupt have this power. It is conceded, that commissioners under the old bankrupt act had no such power ; the question is, whether that power is given under the authority of the new act. We do not dispute the legislature had power to do it, but so enormous a power as this is not to be assumed inferentially under any act of parliament ; and, so far from there being an inference that any such power was intended under this act, it is directly the contrary ; and the legislature have not only not conferred this power upon the commissioners appointed under this act, but not even so large a power as the commissioners under the old act exercised, for it has narrowed the power of the single commissioner, in express terms, as far as regards the right of committal. But, with respect to the first section of the act, the utmost that can be said to be given to the commissioners, even without referring to the other sections, would be, that they should stand in the same position as any single judge of a court of record. The Court itself is “ to have, use, and exercise the rights, incidents, and privileges of the courts at Westminster ;” the single judge and single commissioner, of a single “ judge of a court of record.” It was contended, that a judge of record at Westminster had the power to fine and imprison ; the Court has, but the judge sitting at chambers has not : and there cannot be a clearer proof than that, upon the disobedience of a party served

1835.

—  
 REX  
 v.  
 FAULKNER.



1835.

—  
 REX  
 v.  
 FAULKNER.

with a judge's order, neither the judge nor the Court can attach, because it is no contempt of Court; it must be made a rule of Court, and then, if the parties disobey, the Court will enforce an attachment. The judge cannot fine and imprison; it is the Court; and it must be a contempt of the Court to allow it. The judges sitting at chambers are not the Court; they are merely aiding and assisting the Court. The origin of judges sitting at chambers and making orders seems to be quite lost in the lapse of time; the only authority upon it is the celebrated case against Mr. *Wilkes* (a): the question arose there respecting an amendment made in an information against him by the judge at chambers.

[Mr. Baron *Parke*: — The whole history of that is contained in the *King v. Almon* (b), in Mr. Justice *Willes*'s notes.]

Lord *Mansfield* went fully into it in that case; he stated, "The business is part of the practice of the Court; in what way it commenced I cannot tell; and the order of the judge when made will be binding, but it is no contempt to disobey that order. If you want to have the order enforced as a contempt of Court you must make it a rule of the whole Court; then it is disobedience."

[Mr. Baron *Alderson*: — The great difficulty of doing otherwise was shown in a late case, where the process had to be enforced in the course of the vacation; the Court was obliged to make a rule, fixing the sheriff with all the consequences of disobeying the judge's order, not to be enforced till after the subsequent term, when it had been made a rule of Court; it would have been much simpler to have enforced it by the order of the judge at once.]

This is decisive as to the extent of the authority of the judge, because, if he could imprison or fine for con-

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(a) 4 *Burr.* 2527.

(b) 5 *Burr.* 2686.



tempt of his own authority, why cannot he enforce his order? that is surely a contempt of Court, as tending to the obstruction of justice; and as he cannot do it by the constitution of this country, the power is reserved to the Court, and is not conferred upon the judge, any more than upon the officers of the Court: and, although all are acts of the Court, and done in the name of the Court, the masters, who tax the costs, and make their allocaturs, and do the ordinary business of the Court, have no power to fine or imprison, or make the disobedience of their allocatur a contempt of Court; it must be brought into Court, and made a rule of Court. In the case to which Mr. Baron *Parke* alluded it was intimated that the single judge had the power.

[Mr. Baron *Parke*: — Not in the *King v. Almon*. (a)  
“It would be fit to attach any person guilty of contempt by libelling a judge.”]

That would be done by the Court; that is what is stated in the judgment; it rather fortifies the position. What is the argument of the Attorney General upon the construction of the act? He says there is no provision in the act by which all these functionaries are to sit together, and, therefore, he supposes there must be creations of inferior courts. This may or may not be; still, if the business is to be carried on by the different parties, they do not constitute the Court of Bankruptcy, and consequently cannot act as a court of record; and, if the Court of Review had all the powers of a court of record by the first section of the act, the fourth section, as to directing issues, is unnecessary; for if, by the first section, it had formed a court of record, and had all the rights, incidents, and privileges of a court of record, as fully to all intents and purposes as the courts at West-

1835.

—  
REX  
v.  
FAULKNER.

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(a) The *King v Almon*, 4 Burr. 2527.



1835.

---

 Rex

v.

FAULKNER.

minster, why do we find a section saying, to enforce their orders and decrees they shall exercise all the powers vested for such purposes in any of the courts of record at Westminster? Their power, then, is confined to the power given by the 4th section, which does not refer to fining or imprisoning for contempt. So, again, these Subdivision Courts are to sit for certain purposes, but there is no section in the act extending to them the limited powers which are given by the 4th section to the Court of Review. The 6th section gives the Subdivision Court the same powers which belonged to the old commissioners; but if the single commissioner is to be armed, inferentially, with this irresponsible power over the property and liberty of the subject, how can it exist consistently with the 7th section of the act, which restricts the single commissioner from committing under any circumstances whatever?

The 34th section of 6 Geo. 4, following the one in which the commissioners had power given them to commit, contained clear cases of contempt; but, by section 7, no single commissioner shall have power to commit any person examined before him otherwise than so and so, but he is to have the powers conferred by the former act. But what were these powers? why, to commit any person refusing to be sworn, or to answer satisfactorily, or to answer lawful questions, or to produce his books when required by the commissioners. Take any one of these cases; they are clear contempts, and yet the commissioner has no power to commit, but must refer it to the Subdivision Court. Is not this conclusive, that the commissioner has not the powers of a court of record. What absurdity would it be! You cannot commit for any one of the contempts under the former act, and yet you may for another contempt which has nothing to do with the course of proceeding. So far, then, from there



being a power inferentially given to the commissioners under this new act, it is plain the framers of it did not intend to trust the single commissioner, even with the powers exercised by the commissioners under the old act of parliament. Now, under the old act, commissioners had no power to commit even for a contempt in the very face of the Court; it was found necessary to pass an act (a), which is still in force, by which the commissioners were authorized to order into custody any person who should be guilty of riot or disturbance, and to have them taken before a magistrate. The act has given no such power to the commissioner; it in truth leaves it precisely as it stood before, with this exception, that it has narrowed it as to the power of committing or fining for contempt. The other sections referred to strengthen the position. The 10th section is one as to the case of attorneys and solicitors practising, and being guilty of contempt. First, there is the 7th section, taking the contempts provided for by the former act to the Subdivision Court; then we find the contempt created in the 10th section, which is to be brought before the Court of Review; then there is the 16th section (b), by which

1835.

—  
 REX  
 v.  
 FAULKNER.

(a) 1 & 2 Geo. 4. c. 115, s. 2.

(b) " And be it enacted, that all the laws and statutes, rules and orders, now in force relating to bankrupts, or to commissioners of bankrupt, or to proceedings under such commissions, or to the subject matters of such proceedings, or to the persons concerned therein or in any way affected thereby, shall in like manner extend and be construed to extend in every respect, as far as the same may be applicable, to this act, and

to fiats issued in pursuance thereof, and to all proceedings under the same, and to all the subject matters of such proceedings, and to all persons concerned therein or in any way affected thereby, to all intents and purposes whatsoever, as if every such fiat were a commission of bankrupt under the great seal of the United Kingdom of Great Britain and Ireland, save and except as may be otherwise directed by this act."—1 & 2 W. 4, c. 56, s. 16.



1835.

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REX  
v.  
FAULKNER.

commissioners of bankrupt now have precisely the same powers and privileges and the same protection as was given to commissioners before, and to every body who acts under it. Then the 30th and 38th and 21st sections were referred to. As to the 21st, which provides that the judge may act as commissioner, he has no power when sitting in that capacity to fine, or any thing of the kind. Even in cases provided for by the act, if a judge should act as commissioner, and a party should be guilty of those several species of contempt, the judge must bring it before the Court of Review. The commissioners act in two capacities, the one as forming a part of the Court of Bankruptcy, the other as judges of the Subdivision Court. They are not acting by the 7th section as judges of the Court of Bankruptcy; the persons who do in effect constitute the non-existing Court of Bankruptcy, and are judges of the Court, have also another office conferred upon them by the 7th clause, giving them the same powers as the old commissioners; but in order to show that the character of commissioner, *quà* commissioner, and the character of commissioner as judge is dissimilar, the judges cannot act as commissioners without a special power given them by the 21st section of the act.

With respect to the 30th section, I do not see that it throws any light upon the subject. Then the section with respect to agreeing to arbitration. Now it probably may be contended, from all the purview of this act, (because, although the act is not clearly worded, there is enough to show that where the Court of Bankruptcy is used subsequently it means the Court of Review,) that the single commissioner has the power to issue an attachment for the non-performance of an award submitted to before him. There is not the slightest pretence for saying that such power is vested



in the commissioner. It is obvious that "the said Court" in the 38th section, by which the judges and commissioners may take the examination either *vivâ voce* or upon affidavit, means the Court of Bankruptcy; and in no one part of the act is the word "Court" used as applicable to a commissioner; it is either with reference to the Court of Review, the Subdivision Court, or the Court of Bankruptcy.

We submit, therefore, that the commissioner has not this power, and that under no circumstances a judge, as a judge of a court of record, could impose this fine; and, if we are confined to the act, that upon the construction of it the legislature never contemplated extending this power to commissioners of bankrupt, and that there is not a syllable in it from which it can be inferred.

Lord *Abinger*: — If I felt any doubt upon this case I should have taken some time to consider it, both from the importance of the question, and from the respect I feel for the commissioner by whom the order has been made; who, in his anxiety to discharge his duty to the public, and to protect the dignity of his court, appears to me to have erred in his construction of this act. It is not very clearly penned, and during the course of the argument my mind has frequently fluctuated, and I have hesitated again and again before I could arrive at what appears to me to be the correct conclusion. I am satisfied that Mr. *Fane* has exercised a power not authorized by the act. The argument is, that the first clause of the act which constitutes the Court of Bankruptcy makes that Court, together with every judge and commissioner, a court of record, possessing all the rights, incidents, and privileges of a court of record. It is contended that the commissioner, when exercising any functions with which the act invests him,

1835.

—  
 REX  
 v.  
 FAULKNER.



1835.

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REX  
v.  
FAULKNER.

is sitting as a judge of a court of record; but this appears to me to be a construction by inference only, and I cannot think that such an important power, the exercise of which is always attended with considerable nicety, and sometimes with great difficulty and delicacy, would be vested by inferential construction instead of express enactment; and this, too, in an act which pretty clearly defines in the original clause what the powers of the Court of Review, the Subdivision Courts, and the commissioners are, and goes so far, where the very subject of contempt is mentioned, as to define what shall be done in that particular case.

It is sufficient to say, if we are bound to find a meaning for every word in that clause, that the incidents and rights given to a judge of record were meant to protect him from being liable to the consequences of an action for any act he might do in exercising his functions; but it would not follow from this that the legislature intended to give him all the powers of a judge of record to the full extent; and that the act did not mean to do so is plain, for it has not contented itself with leaving the supposed powers doubtful, but in many of the clauses it defines what those powers shall be. It is sufficient, therefore, to say, that the clause in the act creating a court, and which in no part of the subsequent clauses seems to have any functions in existence, namely, the Court of Bankruptcy, meant (if the clause has any meaning at all) only to give to any act done by the Court, or any subdivision court, or by any judge or commissioner of any court, the same privileges and protection that a judge of a court of record would have. A judge of a court of record very often is engaged in the performance of functions which are wholly unconnected with his power of committing. A judge of the Court of King's Bench who grants a warrant at chambers is pro-



tected, although he should mistake the jurisdiction. Nobody would imagine that a judge, because he might grant a warrant on an information laid before him, could, in his private capacity, as a judge of a court of record, punish any man for a contempt by fining him. Suppose an application is made for a warrant, and at the moment he is about to grant it, any letter were presented to him, or any insult offered to him, I believe there is no case to be found where a judge has ventured to fine or imprison without the authority of the court. Again, the judges of the different courts, who are discharging their judicial functions separately and in chambers, as ancillary to the general business of the court, have never yet ventured to act as courts of record; they are judges of record, but they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the power of a court of record, which is illustrated by the instance referred to, — that an order of a judge at chambers cannot be enforced by attachment, but must be made first a rule of court before there is any contempt in violating it.

But, to go further, it appears to be the object of the act to establish a Court of Review, consisting of four judges, and to appoint six commissioners, of whom three may form a Court of Subdivision, and the other three another Court of Subdivision; and that this Court should have all the jurisdiction that the Court of Chancery before had in bankruptcy, and that the Courts of Subdivision should have all the authority and power that commissioners of bankrupt had before. If you take away that section which specifies what the commissioners do when they sit singly they would have no right to sit singly at all; they would only have the right to sit in subdivision, to perform the same duties

1835.

—  
 REX  
 v.  
 FAULKNER.



1835.

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REX  
v.  
FAULKNER.

which were previously performed by the commissioners of bankrupt. Then comes a clause for the purpose of giving more facility to the act in operation, to enable one commissioner to do what? why to exercise the same functions which commissioners of bankrupt exercised before. Three commissioners of bankrupt were by the old law to constitute a proper tribunal; three commissioners now form the Court of Subdivision. But it occurred to the framers of the act that it would be convenient in many cases, as the business increased, to allow one commissioner to do many of the official or ministerial acts, and it gives him the same powers and authorities which the commissioners of bankrupt possessed under the act then in existence. What were those powers and authorities? They were limited and defined by previous acts of parliament, and undoubtedly they did not embrace the authority now in question, of committing for a contempt, because we all know that an obstruction or contempt of the commissioners would have been punished only by an attachment from the Court of Chancery, on complaint made to the Chancellor; and by the construction of the second clause of the act all the powers which the Court of Chancery had exercised before, on any complaint made from the commissioners, it appears to me the Court of Review may exercise now; and therefore I see no difficulty at all in allowing the commissioner, when he is acting in his individual capacity, and meets with an obstruction, to bring his complaint before the Court of Review, in like manner as he might have brought it before the Chancellor. The commissioner, then, has all the authorities and powers that the three commissioners of bankrupt had before, with one exception, which applies very strongly by analogy to the case now before the Court; he cannot commit as the three commissioners might have done;



here his power is qualified, as this power is vested in the Subdivision Court. It appears, therefore, finding nothing in the direct words of the act to give this power, but that, on the contrary, there is something like a jealousy against the act of a single commissioner exercising even the same power which the three commissioners exercised before under the old act, and that the power of the single commissioner is actually referred to, and founded on the powers possessed by the former commissioners, who were admitted not to possess this power,—it appears to me we should put a violent construction on this act if we thought that it authorized the commissioners, sitting separately, and performing the functions of the former commissioners of bankrupt, and with the same authorities, but somewhat more limited, to exert a power of committing for contempt.

This opinion makes it unnecessary to consider whether the proceeding brought before the Court was that sort of contempt or obstruction of the Court which in a court of record might be punished. That is always a difficult question to be considered, and I am very glad we are not bound now to enter into it. Upon the whole, it appears to me, even supposing it to have been such a contempt as would have justified the commissioner in referring it to the Court of Review to commit, yet that in this case the commissioner, sitting separately, had no power to exercise this authority, and therefore I think the rule must be made absolute.

Mr. Baron *Bolland* : — I am of the same opinion ; and, after the observations made by the Lord Chief Baron, I might content myself with simply expressing my acquiescence in his judgment ; but as it is a new question, and of great importance, I will state the reasons of my concurrence with his Lordship. It

1835.

REX

v.

FAULKNER.



1835.

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REX  
v.  
FAULKNER.

appears, that in order to carry into execution a measure of very great importance, and which to the knowledge of us all had for some years excited great interest, it was thought right to select ten persons to subdue the very great press of business which might offer itself to their attention, which ten persons were to constitute a Court of Bankruptcy, possessing the same powers and privileges possessed by courts of law or judges at Westminster, although it does not appear that the ten have in practice ever sat. These ten persons, thus constituting a Court of Bankruptcy, are subdivided into different tribunals. By the second section a Court of Review is formed of three of the judges of that Court, or the whole, if they think proper to sit; and by the second section the Court of Review is to hear certain matters that are to be brought before it. It is by the fourth section (a) enabled to order issues to be tried; and by the sixth section (b) the six commissioners are divided into two Subdivision Courts. Now, these are the Courts that are to exercise their functions under this bill; but in order to facilitate the intent of the act of parliament, and to carry it more fully into operation, the legislature has, by the seventh section (b), provided that any one commissioner may sit to perform the functions that were performed by commissioners of bankrupt under the old act.

To form a correct view of the intention of the legislature, let us for a moment consider how the business was transacted before this act passed into a law. Every one who is familiar with the manner in which business was done by the commissioners under the old act must know, that, from the very great press of business, it was absolutely necessary for one of the commissioners separately

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(a) *Ante*, page 316.

(b) *Ante*, page 318.



to act (as a judge of the other Court sits now apart from us), who, by examining the witnesses, and taking the proof of debts, saved time, and greatly facilitated business. Of the propriety of this mode of proceeding doubts were occasionally expressed: in order, therefore, to throw a protection round commissioners sitting alone, this 7th clause (a) gives to one commissioner all the powers possessed by the commissioners under the old act of parliament; but it goes further; for it takes from him that power which three commissioners under the old act possessed, viz. the power of committing; clearly showing, that the legislature did not mean to intrust this great power to a single commissioner, when sitting in his individual character. By the 10th clause I think it perfectly clear, that, in matters of contempt, the legislature has shown that it has not invested the single commissioner with the power now contended for; because, although it may be said that it is doubtful whether an attorney or solicitor practising in the Court, without being duly admitted, could be said to be guilty of a contempt, unless it had been made so by the legislature, yet, having been made a contempt, how is it dealt with by the act? and the answer is obvious; the act says he shall only be liable to punishment upon complaint to the Court of Review. Why, by a parity of reasoning, if a contempt can be punished by the single commissioner, cannot this contempt be punished? I cannot conceive a greater contempt than a person practising as an attorney in cases of bankruptcy who is not permitted to do so by the law of the land. On these grounds I perfectly agree with what has been said by the Lord Chief Baron. I had originally no doubt, and I am more confirmed in the opinion I had formed by what I have heard to-day.

1835.

—  
 REX  
 v.  
 FAULKNER.

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(a) *Ante*, page 318.



1835.

—  
RRX  
v.  
FAULKNER.

Mr. Baron *Alderson* : — I am of the same opinion. I quite agree in the law as laid down by the Attorney General, that, if there be a power to commit for contempt, the contempt is not examinable before this Court. The essence of giving such a power is, that it should be exercised at the discretion of the judge; but for this very reason it seems important to consider whether so large a power is given by the legislature, and vested irresponsibly in the hands of any man whatever. We ought to have clear, not inferential, authority for that. The main stress of the Attorney General's argument rests on the first clause of the act (*a*); but it seems to me that the first clause may have a very reasonable construction without giving to the single commissioner this great power. It is said, that by the words of the first section every commissioner possesses the powers and privileges of a court of record as fully as they are exercised by the courts of record at Westminster; but the words of this, as of every act, are to have a reasonable construction, and they may have a very reasonable construction by being construed distributively; that is, by giving the Court of Bankruptcy the incidents and privileges of a court of record, and by giving to judges and commissioners of courts of bankruptcy the rights, incidents, and privileges that belong to a judge of a court of record. No one of the rights, privileges, and incidents of a judge of a court of record necessarily carries with it the power of committing for contempt; and therefore it seems to me, that the first clause, being construed distributively, may have a perfectly sensible construction, being intended to constitute the court as a court of record, with all its rights, incidents, and privileges; that is, having its records treated as all the other records of another court, and each of its judges

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(a) *Ante*, page 313.



having the same protection and privileges which judges of the courts of record have, of not being answerable in an action for any opinion or acts which they have done in their judicial capacity and character. That will give a clear and sensible construction, without inferring this irresponsible power ; and it seems to me that it is much more consistent with the other clauses of the act. For instance, it appears much more consistent with the fourth section (a) than the construction put upon it by the Attorney General, that each of the judges and each of the commissioners has the full power of a court of record, and yet we find the Court of Review itself, which consists of four of the superior members of this Court, has only those powers to enforce its orders and decrees which are vested in the courts of record at Westminster. . A special power is given to the Court of Review unnecessarily by the fourth section (a), if the first section had given them all the powers, and all the privileges, and all the incidents, but not unnecessarily if the construction I put on the act be the true one. So the 7th section is utterly inconsistent with the argument, that the commissioners have all this power. The 7th section (b) gives to the commissioner, when he sits alone, the same powers that were before vested in commissioners of bankrupts ; and then it goes on to provide, that he shall not have, to the full extent, the same powers which those commissioners previously exercised ; for it prohibits him from committing the bankrupt, or other person examined before him, otherwise than to the custody of the messenger or other officer, to be brought up before a Subdivision Court or the Court of Review. Now, if each of these commissioners had all the powers incident to a court of record, he would have larger powers than commissioners of

1835.

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 REX  
 v.  
 FAULKNER.

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(a) *Ante*, page 316.

(b) *Ante*, page 319.



1835.

REX  
v.  
FAULKNER.

bankrupts had before; and yet by the 7th section the act gives him less extensive powers than commissioners of bankrupt exercised before. I think, therefore, to adopt the general construction which is sought to be inferred from the words of the first section would be to convict the framers of the act of very strange carelessness, in wording the act so as to make it utterly inconsistent with itself; but the view I take of it seems to make the act quite consistent with itself, inasmuch as it is reasonable they should have the protection of a judge of record, but with powers not quite so extensive as those possessed by the other commissioners. There are other sections in the act leading to the same construction; and it seems, taking the whole together, that the most reasonable construction of this act is to consider the first section as giving the privileges to judges, and not powers. (a) If so, then Mr. Fane has

(a) In consequence of this case it was enacted, by 5 & 6 W. 4, c. 29, s. 25, that "every judge or commissioner appointed or to be appointed by virtue of the said first-recited act, sitting alone and acting in execution of the duties imposed upon him as such judge or commissioner, shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a court of record: Provided always, that nothing herein contained shall be deemed or taken to authorize or empower any such judge or commissioner sitting alone to impose any fine or commit for a contempt of court, but every contempt of any such judge or commissioner, sitting alone and acting as aforesaid, shall be cog-

nizable by the said Court of Review, to which the same may be referred by any such judge or commissioner as aforesaid; and the said Court of Review shall have full power to deal with the same as a contempt of the said Court of Review: Provided also that nothing herein contained shall be deemed or taken to diminish or affect the power by the said first-recited act given to any such judge or commissioner of committing any person examined before him to any messenger or other officer of the Court of Bankruptcy."

Q. 1. *Can any doubt be entertained of the wisdom of this enactment?* Although it may be supposed that one judge, se-



conceived himself to be invested with a power which the law has not given to him. I think, therefore, the rule must be made absolute.

Rule absolute.

1835.

REX

v.

FAULKNER.

lected for his great attainments as a Lord Chancellor, and surrounded by all the ability of the profession, is the best constituted tribunal, yet great doubt has been entertained upon this subject.

From facts which have occurred in our own times, it cannot but have occasionally passed across the mind of every man, that whatever may be the advantages attendant upon the constitution of a tribunal with one judge, it is, when the science is extensive, and the appeal attended with delay and expense, exposed to considerable evils.

The 38th aphorism in *Bacon's* celebrated work upon universal justice is, in speaking of courts of equity, as follows:—“*At curiæ illæ uni viro ne committantur, sed ex pluribus constant: nec decreta exeant cum silentio, sed iudices sententiæ suæ rationes adducant, idque palam, atque astante coronâ: ut quod ipsâ potestate sit liberum, famâ tamen et existimatione sit circumscriptum.*”

If such be the case with respect to superior tribunals, it is easy to conceive what errors,—what excesses will exist in an inferior tribunal, when one commissioner

acts without any check from liability to an action, if his conduct be unjust or illegal; without any check from his profession; and without any fear of removal by the Lord Chancellor. It has been said, that in private conversation the word most to be avoided is the monosyllable I.

I trust that none of my readers will be so unjust to me as to imagine that these general observations have any allusion directly or indirectly to the commissioner: it has been my good fortune for many years to live in habits of intimacy and friendship with Mr. *Fane*: in private life I think of him with great affection and respect, and I well know, that to the public his only wish is kindly, faithfully, and fearlessly to discharge his public duties.

Q. 2. *Will not the provision in this clause of reference to the Court of Review render the power of committing for contempt wholly inoperative?* unless, indeed, it is to be supposed that a commissioner is to present a petition supported by affidavits, and incurs all the expenses and risks attendant upon litigation.

Q. 3. *Ought not each tribunal to consist of two commissioners?*

B. M.



LORDS  
COMMISSIONERS.  
*July 28,*  
1835.

*Ex parte* WATKINS. — In the matter of KIDDER.

THIS was an appeal from the decision of the Court of Review, as reported, 1 *Mont. & Ayr.* 689, on the following

#### SPECIAL CASE:

In 1827 *Watkins* was the holder of two shares in the Economic Assurance Company, London, which shares then stood in the books of the Company in his name. *Watkins* in June 1827 purchased, through the agency and assistance of *Allen*, then one of the directors of the Company, and as such described in the certificate after set forth, six other shares in the said Company, numbered respectively 73, 128, 170, 171, 168, and 169, at 250*l.* per share. By the rules and regulations of the Economic Assurance, no person (except director, which *Watkins* was not) is capable of holding in his own name more than two shares: many persons are, however, beneficially interested in more than two shares, by having the additional shares entered in the books of the Company in the name or names of another person. Many additional shares are so held by different persons. *Watkins* requested the bankrupt, *Kidder*, to allow two of the six additional shares to stand in his name in the books of the Company in trust for him, to which *Kidder* assented. And two of the six additional shares, numbered 73 and 128 respectively, were accordingly entered in the books of the Company in the name of *Kidder*. *Watkins* paid the whole of the purchase money for the two shares numbered 72 and 128, as well as for the other four hereinbefore mentioned, and all expenses attending on the purchase thereof.

The only evidence which the holders of shares have of their right to such shares, besides the entry in the

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares, but the shares belong to another person, in whose favour there exists a secret declaration of trust, the shares are in the reputed ownership of the bankrupt.

That one of the directors and an actuary knew the shares not to be the bankrupt's, is not sufficient to prevent reputed ownership.

*Ex parte Watkins*, 1 *Mont. & Ayr.* 685, reversed.



register and books of the Company, is a certificate under the hands of three of the trustees of the Company. The certificates of the two shares numbered 73 and 128, were as follow:—

1835.

—  
*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

“ Economic Life Assurance Society.

“ This is to certify that *John Kidder* is the holder of one share, numbered as under, of and in the temporary capital of the Economic Life Assurance Society in London, as appears by the register in the office, and the said *John Kidder* is entitled to all advantages arising from the said shares, subject to the several conditions and stipulations of the agreement of settlement establishing the society.

“ Witness our hands, &c.

	“ <i>L. B. Allen,</i>	} Trustees.
	“ <i>Thomas Fenn,</i>	
“ No. 73,	“ <i>John Knowles,</i>	

“ Entered *John Naylor*, Actuary.”

Immediately after the two shares, numbered 73 and 128, were entered in the books in the name of *Kidder*; and on the same day *Kidder* duly made, executed, and delivered to *Watkins* a declaration of trust in the following terms:— “ I, *John Kidder*, of, &c. do hereby declare, that the two shares numbered , standing in my name in the Economic Life Assurance Office, were purchased and paid for by *George Price Watkins*, with his own monies and for his own sole benefit, and that my name is only made use of in trust for him, his executors, administrators, and assigns; and I do hereby engage to assign the said shares to him, or to whom he shall appoint, at his expense, whenever required.” *Kidder*, down to the time of the issuing against him of the fiat herein-after mentioned, always had the certificates in his own possession, and always received the dividends on



1835.

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*Ex parte*  
WATKINS.In the matter  
of  
KIDDER.

the two shares numbered 73 and 128, and was always treated by the Company as the real owner thereof; and all notices of meetings and other transactions of the Company were directed to *Kidder*, and he attended such meetings of the shareholders, and voted as one of the registered shareholders.

That it was well known to *L. B. Allen*, who was then a director, and to *J. Naylor*, who was then the actuary of the company, that the two shares, though held by *Kidder*, were the property of *G. P. Watkins*; but beyond such knowledge of *L. B. Allen* and *J. Naylor* the company never received any information that *Kidder* was possessed of the two shares in trust for *Watkins*, or otherwise than the owner thereof. On the 3d of March 1834 a fiat issued against *Kidder*, under which he was duly declared a bankrupt, and *George Burbridge* and *Edward Scargill* were duly chosen assignees. On the 21st June 1834 *Watkins* presented his petition to the Court of Review, praying that assignees under the fiat might join with the directors of the Economic Insurance Office in assigning to him, or such person as he should direct, the interest in the shares.

The assignees under the fiat claimed such interest on the ground that the shares, and all rights to the proceeds thereof, were, at the time of the bankruptcy, in the possession, order, and disposition of *Kidder*, as reputed owner thereof. The petition was heard on the 30th of July last, when the Court of Review adjudged that the shares were not in the possession, order, or disposition of *Kidder* at the time of his bankruptcy, as the reputed owner thereof, and were pleased to order accordingly that the prayer of the petition should be granted.

The assignees are advised, and submit, that such order



was erroneous, and claim the two shares as having been in the order or disposition of *Kidder*, and whereof he was the reputed owner at the time of the bankruptcy.

The question is, whether they be so entitled or not?

Settled and approved, 13th of March 1835, by me,

*T. Erskine.*

1835.

*Ex parte*  
WATKINS.

In the matter  
of  
KIDDER.

Mr. *Montagu* and Mr. *Bethell* for the appellants: —

The arguments of the respondents will be,

1st, That notice was not necessary, as this was a trust.

2d, That if notice were necessary, sufficient notice was given.

As to the trust, there was not an uniformity of opinion by the judges in the Court of Review. The Chief Judge said (a), “Here the property follows the title. His title is as trustee; he holds as trustee; he had a right to hold. The mischief the act intended to remedy was, where the title was in one person, the possession in another, as decided by Lord *Eldon* in *ex parte Martin*.” (b) And again (c), “I do not see that the clause as to trust property is confined to cases where the bankrupt is actually entered on books, &c. as a trustee; bank stock is not so entered. The shares standing in the names of the trustee was quite consistent with the legal title which was in him, as Lord *Eldon* said in *ex parte Martin*.” (b)

Sir *John Cross* said (c), “In this case the bankrupt had possession, and he had a legal title to the possession, consequently the 72d section does not apply.”

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(a) *Ex parte Watkins*, 1 Mont. & Ayr. 696.

(b) 2 Rose, 332. S.C. 19 Vesey, 494.

(c) *Ex parte Watkins*, 1 Mont. & Ayr. 697.



1835.

—  
*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

The observations of Sir *George Rose* were (a), “The notice to the director and to the actuary is certainly very material; without that I should doubt the effect of the declaration of trust. The 79th section does not apply to this case, it merely enables a party to apply by petition instead of Bill. The question is, was the bankrupt a trustee? If so, the assignees have no title to the property. But whether he were trustee or not might be a question. As to the written declaration of trust, would that alone have prevented the bankrupt selling the property or from holding himself out the reputed owner? I should have some difficulty in saying that this property was not in the reputed ownership, if the right of the petitioner depended on the declaration of trust only.” After which observations by Sir *George Rose*, the Chief Judge said (b), “My judgment was founded on the existence of the declaration of trust alone.”

That the opinion of Sir *George Rose* expressed the law appears from a moment's consideration of the principle, and of the cases which have been decided.

If a secret declaration of trust were sufficient to protect the proprietor from the consequences of enabling the possessor to gain delusive credit by the possession the statute would be wholly useless, the property would be entrusted, delusive credit would be given, and the secret trust would sanction the delusion.

That there are cases where a trust will prevent the operation of the 72d section is indisputable; but the very existence of these cases (which are exceptions) is conclusive against the secret trust in the present case.

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(a) *Ex parte Watkins*, 1 Mont. & Ayr. 697.

(b) *Ex parte Watkins*, 1 Mont. & Ayr. 699.



Property in the possession, order, or disposition of a trader is *prima facie* in his reputed ownership; but it may be so in his possession, order, or disposition as not to create any such reputation. Who ever supposed that the property entrusted by the proprietor to a banker or a factor was in his reputed ownership? The cases, therefore, of property so entrusted as is not within section 72 are instances of trusts of such a nature as not to mislead any man conversant with mercantile affairs. Trusts in the course of trade, as to bankers, factors, &c. have therefore always been excluded from the operation of the statute for an obvious reason, — because they do not create a reputation of ownership.

This is stated by Justice *Buller* in *Bryson v. Wyllie* (a), who says, “The case of a banker or a factor does not come up to the present; for there, by the course of trade, they must have the goods of other people in their possession; and therefore it does not hold out a false credit to the world.” And the same position is stated in *Collins v. Forbes* (b) by Lord *Ellenborough*, then at the bar, who says, “The distinction seems to be, where, from the nature of the person’s dealing, it is notorious that his possession is merely that of an agent. There it shall not bind the principal, as in the case of a factor; but, where the nature of the dealings cannot afford any such presumption, there the possession must bind the property.” Bankers and factors must have the goods of other people in their possession, and therefore it does not hold out a false credit to the world. So, too, trusts, from the known relations of society, as in the cases of marriage settlements, are not within the statute, because it is notorious that the property of feme coverts

1835.

—  
*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

(a) *Bryson v. Wyllie*, 1 Bos. & Pull. 83.

(b) *Collins v. Forbes*, 3 Ter. Rep. 318.



1835.

*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

is thus protected; *ex parte Horwood*. (a) For the same reason the possession of furniture let at watering places, or job horses, &c. is not within the statute; *Lingham v. Biggs*. (b)

But if the reputation of ownership can be defeated by a secret trust, the statute will be a dead letter, for every proprietor will secure himself by this happy expedient, the contrary to which has been considered law, from the reign of James to the present time. It is manifested by daily practice in all cases of mortgages, when the mortgagor in possession is trustee for the mortgagee; *Ryall v. Rowles* (c), and every case of mortgage which since that time has occurred; as for instance *Bryson v. Wylie* (d), *Horn v. Baker* (e), and every other case of mortgage. In *Thackthwaite v. Cock* (f) there was a custom that purchasers of hops from hop-merchants should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, and it was held that this is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. In that case Sir *James Mansfield* says, "Though the custom of a trade may have the effect referred to in *Horn v. Baker* (e), it must be a custom much more clearly proved than this is, and must be such a custom that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor. There is not such a clear, dis-

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(a) *Ex parte Horwood*, *Mont. & Mac.* 169, and *Mont.* 24.

(b) *Lingham v. Biggs*, 1 *Bos. & Pull.* 82.

(c) *Ryall v. Rowles*, 1 *Ves.* 348.

(d) *Bryson v. Wylie*, 1 *Bos. & Pull.* 83.

(e) *Horn v. Baker*, 9 *East*, 215.

(f) *Thackthwaite v. Cock*, 3 *Taunt.* 487.



ting, and precise custom proved as would enable others to see that these may not be the hops of the possessor."

[L. C. Shadwell :— Do you know any instance of a trust of choses in action having been decided not to be within the statute?] In *ex parte Richardson* (a) it was assumed that trust property, standing in the name of the Accountant General, is within the statute.

As to section 79, it is as follows :— " If any bankrupt shall, as trustee, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

The object of this section was totally mistaken by two of the judges of the Court of Review, as the only intention of the legislature was to give that jurisdiction by

1835.

*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

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(a) *Buck*, 484.



1835.

—  
*Ex parte*  
 WATKINS.  
 In the matter  
 of  
 KIDDER.

petition; which before existed only by bill, as was settled in *ex parte Hancox*. (a) The Vice-Chancellor says, "The object of the act is to prevent the expense and delay attendant upon a bill; and as in a bill it could not be deemed necessary to nominate a trustee when the trusts are executed, so, in the present case, instead of the useless nomination of a trustee, where there is no trust to be performed, I shall, under the words and within the spirit of the act, direct the property to be transferred to the petitioner."

2dly, As to the sufficiency of the notice.

There are cases where the sufficiency of the notice required by the act is recognized. First, in *ex parte Stright* (b), where the bankrupt deposited two life policies with *Worger* as security for 300*l*. *Worger* sent the following letter to the secretary of the insurance office: — Mr. *H. P. Smith*. "Sir, I am holder of the under-mentioned policies, and shall feel obliged if you will inform me what sum the office will give if they are delivered up to be cancelled with the consent of the parties; — No. 79,766, 5th May 1829, 500*l*., *Maria Eyles*; No. 65,953, 19th February 1822, 500*l*., *J. E. Eyles*. Your reply will oblige your obedient servant, *John Worger*." And the Court said, "It is quite clear the letter is sufficient notice. In these cases the slightest circumstance of notice is sufficient; and this is so plain a case, that the petition must be dismissed, and the costs paid by the assignees personally."

Upon this case it is sufficient to say that the mere question was, whether in fact notice was given. If it were such a notice as would put a lender on his guard, it is sufficient, whether slight or strong; but if an evasion of the statute it is not any notice.

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(a) *Ex parte Hancox*, Mont. 248.

(b) *Ex parte Stright*, Mont. 502.



In *Smith v. Smith* (a) it was held that if the trustees were made acquainted with the fact of the assignment, although not for the express purpose of giving validity to the assignment, yet the notice was sufficient, which is not denied; but it assumes the very point at issue on this petition, viz. that notice was given.

1835.

*Ex parte*  
WATKINS.

In the matter  
of  
KIDDER.

In *ex parte Carbis* (b), after the bankrupt had delivered the policy to the petitioner, the latter sent his agent to the office to pay the premium. In the course of conversation the agent informed the clerk that the bankrupt had assigned the policy to the petitioner. In that case the Chief Judge said, "Taking it for granted that a verbal notice is enough, if given as notice, is it enough if said in a mere conversation, in which the party did not intend to give notice?" And again, "The intent is immaterial, if it be clear that notice is in fact given. In notices the purposes for which they are given must be considered. In this case it is a question of fact, whether or not the letter did contain any notice. The letter is *not before the Court*. Independently of the letter, here is a mere accidental conversation, in the course of which it slips out that the policy was deposited. The clerk at the insurance office would not notice this, as it was not intended as a notice. *Smith v. Smith* (a) differs from the present case. The only question there was, whether the communication brought the fact within the personal notice of the trustee. Here the question is, whether notice was given to the officer. And Sir John Cross said, "Was notice given? All we know is, that an agent of the petitioner went to the office, not to give notice, but to pay a premium. If a man walks into a banker's, and says accidentally that a bill is dis-

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(a) *Smith v. Smith*, Tyrw. 55.

(b) *Ex parte Carbis*, in note to *ex parte Watkins*, 1 Mont. & Ayr. 693.



1835.

*Ex parte*  
**WATKINS.**  
 In the matter  
 of  
**KIDDER.**

honoured, that is not notice." Sir *George Rose* said, "The assignment of a policy is an equitable assignment, and there is no title in equity till notice thereof has been given. It is not necessary that it should be in writing, but it must be a distinct notice."

From these cases, if cases are necessary on such a subject, it appears that such notice must be given that an inquirer at the office may learn in whom the interest in the policy vested; and, in addition to this, the nature of the notice is defined by statute, as by the 3d Geo. 4, c. 66, which is an act relating to the Economic Life Insurance Society, it is enacted, "that the directors shall cause a memorial of the name and names of the shareholders to be enrolled upon oath."

Upon this head it is sufficient to refer to the special case, which shows, that so far from notice having been given, it was withheld from every person except Mr. *Allen* and Mr. *Naylor*, and that every act of ownership was exercised by the bankrupt. The special case expressly states, that "it was well known to *L. B. Allen*, a director, and *John Naylor*, the actuary, that the shares were the property of *Watkins*; that beyond such knowledge by *Allen* and *Naylor* the Company never received any information that *Kidder* was possessed of the said two shares in trust for *Watkins*, or otherwise than as the owner thereof; that the certificates of title were in the possession of the bankrupt. The shares were in his name; the dividends were received by him. The Company always treated him as the owner. All notices were given to him as owner. He attended all the meetings of the shareholders as owner, and he voted as one of the shareholders.

Mr. *Swanston* and Mr. *Romilly* for the respondents repeated and enforced their arguments urged on the original hearing.

*Curia advisare vult.*



Judgment was subsequently delivered, as follows : —

1835.

Lord Commissioner *Shadwell* : —

In this case it appears to us that the judgment of the Court of Review is wrong, and that the two shares mentioned in the special case belong to the assignees, as having been in the order or disposition of *John Kidder*, and whereof he was the reputed owner at the time of his bankruptcy, by the consent and permission of the true owner, *George P. Watkins*.

*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

The special case shows, that, with the consent of *Watkins*, *Kidder* had in himself the full and absolute legal property in the shares. By the rules of the society *Watkins* could not have had any legal title at all to the two shares; and not only had *Kidder* the evidence of title, which arose from his name alone appearing in the memorial enrolled under the act of parliament, in the books of the society, and in the certificates, but he also had the certificates themselves in his own possession, not occasionally, or for any temporary purpose, but at all times. He always received the dividends, was treated as owner by the company, had notices of meetings served upon him, attended meetings of shareholders, and voted as a shareholder. These things he might have done without being allowed to hold the certificates in his possession. Whether it was for the purpose of preventing any suspicion that *Kidder* was not the true owner, or from not thinking it necessary to take the precaution of keeping the certificates in his own hands, *Watkins* consented that *Kidder* should always have possession of the certificates; consequently he was enabled at all times, by the exhibition of those, the only portable indication of property, to hold himself out to the public as the true owner of the shares, and to gain credit by the disposition of them. There was no open or honest purpose like the payment of debts to



1835.

—  
*Ex parte*  
WATKINS.  
In the matter  
of  
KIDDER.

answer by this trusteeship, as in *Copeman v. Gallart* (a); nor was there any trust for the benefit of third persons, or created by third persons, as in *ex parte Horwood* (b) and *ex parte Martin*. (c) But the trust was created by *Watkins* for his own sole benefit, and for no other purpose than that of enabling him to hold more shares than he was allowed by the regulations of the company to hold in his own name. No convenience to society is promoted by such a trust, and great injury to the public may be occasioned by the delusive credit which it confers. It does not appear to us that the private knowledge which Mr. *Baugh Allen*, one of the directors, and Mr. *Naylor*, the actuary, had of the transaction, could operate as notice of this secret trust to the company, who in fact recognized *Kidder* as the owner. For any thing that appears to the contrary the dividends were received by *Kidder*, and the shares might have been sold by him without the intervention of the director or the actuary, who are alleged to have known the facts. We are of opinion that such a secret trust is not within the true intent and meaning of the 79th section of the Bankrupt Act, but is to be considered as a case of property left in the possession, order, and disposition of the bankrupt, with the consent of the true owner, thereby inducing a reputation of ownership within the 72d section of that act. The judgment of the Court below must therefore be reversed, but without costs.

Order reversed without costs.

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(a) *Copeman v. Gallart*, 1 P. Wms. 514.

(b) *Ex parte Horwood*, Mont. & Mac. 24 & 169.

(c) *Ex parte Martin*, 2 Rose, 331. S. C. 19 Ves. 169. 491.



# CASES

## IN

# BANKRUPTCY.

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*Ex parte* HINTON.—In the matter of HINTON.

C. of R.  
Jan. 28,  
1834.

THIS was a petition to supersede with consent of nine tenths of the creditors, under 6 Geo. 4, c. 16, ss. 133, 134. The office objected to allow the supersedeas, as Lord *Eldon's* order (a) required the commissioners

Supersedeas with consent of nine tenths allowed, though the commissioners certificate did not state what proportion the creditors assenting bore to those who proved.

(a) Tuesday, 27th January 1826. LORD CHANCELLOR:—Whereas by an act passed in the sixth year of his present Majesty's reign, intituled "An Act to amend the laws relating to bankrupts," it is enacted, "That at any meeting of creditors after the bankrupt shall have passed his last examination, (whereof and of the purport of which twenty-one days notice shall have been given in the London Gazette,) if the bankrupt's friends shall make an offer of composition or security for such composi-

tion, which nine tenths in number and value of the creditors then present shall also agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given; and if at such second meeting nine tenths in number and value of the creditors then present shall also agree to accept such offer the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the said commission." And it is also by the said act



1834.

—  
*Ex parte*  
 HINTON.  
 In the matter  
 of  
 HINTON.

certificate to state “what proportion in number and value the creditors assenting to such composition bear to the creditors who shall have proved;” whereas the commissioners certificate as to that point was as follows:—“at which meeting nine tenths in number

further enacted, “That in deciding upon such offer as aforesaid any creditor whose debt is below 20% shall not be reckoned in number, but the debt due to such creditor shall be computed in value; and that any creditor to the amount of 50% and upwards residing out of England shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote by letter of attorney, executed and attested in manner thereby required for such creditors voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the commissioners that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to

attain such assent as aforesaid.”

But there is not any provision in the said act directing the manner of holding such meetings, or in which evidence shall be given of the performance of the several particulars before mentioned. I do therefore hereby order, that at the first of the said meetings a minute shall be taken by the said solicitor of the assignees of the names of the several creditors present, and the amount of the several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition. And I do order, that the second of the said meetings shall be held at a meeting of the commissioners named in each respective commission; and at such meeting the said commissioners do, by deposition of witnesses and documentary evidence, as to them shall appear to be proper, inquire and ascertain whether the several particulars directed by the said act to be performed previous to the holding of such second meeting have been duly performed, and certify the same to the Lord Chancellor, Lord Keeper or Lords Commissioners of the



and value of such creditors then and there present, such number being reckoned according to the provisions and ordinances of the said act of parliament, by writing under their hands did agree to accept such offer. And we do further humbly certify to your honors, that the provisions and ordinances of the said act of parliament and of the general order of the 27th of June 1826 respectively have been in every respect complied with."

The petitioner prayed that the supersedeas might issue notwithstanding the informality in the certificate.

Mr. Teed for the petition.

*Per Curiam*.—The informality arises under one of the general orders, which may be dispensed with, if just. The Court finds grounds in the certificate to presume that all has been done which ought to have been done by the commissioners.

Supersedeas ordered.

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Great Seal, together with the proceedings which shall have taken place at such second meeting. And for the better information of all parties interested I do hereby further order, that the said commissioners do state in such certificate what proportion in number and value the creditors assenting to such composition bear to the creditors who shall have proved debts of the amount of 20*l*. and upwards under the commission, and also whether any sale has been made of the bankrupt's estate in order that provision may, if expedient, be made for confirming the same.

ELDON, C.

1834.

—  
*Ex parte*  
HINTON.  
In the matter  
of  
HINTON.



C. of R.  
Jan. 12,  
1835.

*Ex parte* PRATER and another.—In the matter of HARLEY.

The sanction of the Court given to a pecuniary arrangement by the assignees affecting the estate.

A DISPUTE existed between one *Nestor*, and *Prater*, the assignee of *Harley* the bankrupt, concerning the right to some property; and *Nestor*, in 1824, brought an action, which was stayed till he gave security for costs, which he did not, and died in 1832, leaving *Egan* his administrator.

*Harley* (the bankrupt) was indebted to *Thomas* and Co., who became bankrupt, and *Harley's* debt was sold by the assignees of *Thomas* and Co., and was bought by *Keane*, who owed money to *Atkins*, the petitioner, in satisfaction of which he (*Keane*) assigned the debt he had so bought to *Atkins*.

The outstanding action prevented the assignees of *Harley* from making a final dividend, to obtain which *Atkins* gave *Egan* 50*l.* to discontinue the action.

This was a petition by *Atkins* and the surviving assignee of *Harley*, praying the sanction of the Court to the assignee repaying to *Atkins* the 50*l.* out of *Harley's* estate, and that the costs of the petition, &c. might be paid out of the estate; and it was

Ordered accordingly.

C. of R.  
March 17,  
1835.

*Ex parte* WAITHMAN.—In the matter of RAIKES.

In deposits of shares of insurance companies, where the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership.

RAIKES (the bankrupt) was one of the directors of the Guardian Assurance Company. Messrs. *Deacon* and *Williams*, bankers, held shares in the Company, and the latter partner (*Williams*) was auditor of the

and the latter partner (*Williams*) was auditor of the



Company. *Raihes*, being indebted to *Deacon* and Company, deposited his shares with them: no notice was given to the Company of this deposit.

On a former day *Deacon* and Co. obtained the common order for sale of the policies, &c.

This was a petition by the official assignee (*a*) to discharge the former order, and praying that the policies might be delivered up to him, as having been in the reputed ownership of the bankrupt, for want of notice to the insurance office.

Mr. *Montagu* for the petition.

Mr. *Swanston* and Mr. *J. Russell*, *contra*, were stopped by the Court.

*Per Curiam*.—All parties interested were in the Company, and thus had notice of the transaction; therefore notice would have been an idle form. This is not a case within the rule as to reputed ownership.

Petition dismissed.

*Ex parte* ELLISTON.—In the matter of BLOXHAM. April 24th, 1835.

ON the marriage of *Bloxham* (the bankrupt), 4,000*l.*, of which 2,000*l.* was his property and 2,000*l.* was advanced by his wife's father, was vested in the trustees of their marriage settlement, in trust, after the marriage, to advance the 4,000*l.* to *Bloxham* on his

Furniture, the separate property of the wife, does not pass to the assignees under a fiat against the husband.

(*a*) The official assignee petitioned because the creditors assignee was one of the partners, and could not join in the petition.



1835.

—  
*Ex parte*  
 ELLISTON.  
 In the matter  
 of  
 BLOXHAM.

bond, and to permit *Bloxham* to receive the interest of the 4,000*l.* for life, if he should continue in good circumstances; but if he should fail, then from and immediately after such failure and from thenceforth to pay and apply the interest, dividends, and annual proceeds of the 4,000*l.* (if it should happen to have been previously paid into the hands of the trustees by *Bloxham*,) during the life of *Bloxham*, to and for the separate maintenance and support of the wife and the child and children of the marriage. It being the true intent and meaning of the parties that the 4,000*l.* should be and continue a permanent settlement and provision for the wife and the children of the marriage, in manner aforesaid, and not in anywise be subject or liable to the debts or losses or agreements of *Bloxham*; and in case the 4,000*l.* should not have been paid by *Bloxham* to the trustees prior to his failure, (if that should happen,) or at any time prior to his decease, then the trustees should, with all convenient speed, claim and receive so much of the 4,000*l.* as they could recover or might be entitled to from *Bloxham* by virtue of the bond, and to invest the same, and pay the interest to the separate use of the wife for life, and on her death then for the children, and in default of children for such persons as *Bloxham* should by will appoint, and in default for his executors and administrators. The settlement contained a power for the trustees to invest the whole or part of the 4,000*l.* on any public or private security at interest, to be still subject to the above trusts.

In 1803 the 4,000*l.* was accordingly lent by the trustees to *Bloxham* on his bond. In February 1807 the trustees wrote and demanded the 4,000*l.* from *Bloxham*: it was not paid. In 1809 a commission issued against *Bloxham*. The trustees proved the 4,000*l.*



against his separate estate, and were the only separate creditors. The whole of the separate property being valued did not amount to 4,000*l.*, and was all delivered up to the trustees, to be held on the trusts of the settlement; this property included a leasehold house and furniture. In 1827 a second commission issued against *Bloxham*, under which he did not pay 15*s.* in the pound. The assignees under this second commission claimed the house and furniture, but afterwards relinquished the claim.

1835.

*Ex parte*  
ELLISTON.  
In the matter  
of  
BLOXHAM.

In 1830 the surviving trustee died, leaving the petitioners his executors.

In 1834 a fiat issued against *Bloxham*, under which the messenger seized the house and furniture. When assignees were chosen, notice was given to them that the petitioners claimed the house and furniture under the trusts of the settlement; this notice was disregarded, and the assignees continued in possession of the house and furniture.

The bankrupt and his wife resided in the house, and made use of the furniture in question.

This was a petition by the trustees, calling upon the assignees to deliver up the house and furniture (a).

(a) When the petition was called on, the Court said, that the petitioners must undertake to abide by the order of the Court, because the assignees would be so bound, and because, if the assignees had presented a cross petition for delivery up of the property, the petitioners would then have been bound. But Mr. *Montagu* stating that

the petitioners were trustees who could not so undertake, the petition was allowed to proceed without the suggested undertaking; the Court observing, that if the petition were dismissed, and the petitioners commenced an action, the respondents might apply to the Court for an injunction to restrain the action.



1835.

—  
*Ex parte*  
 ELLISTON.  
 In the matter  
 of  
 BLOXHAM.

Mr. *Montagu* for the petition: — The house and furniture represented the trust fund, and was bound by the trusts of the settlement. The possession of the house and furniture by the bankrupt did not place them in his reputed ownership (*a*), being in pursuance of the trusts of the settlement. This being a third commission, and the bankrupt not having paid 15*s.* in the pound under the second, the third is a nullity (*b*), and gives the respondents no right to the property in question.

Mr. *Swanston* for the assignees: — The possession of the house and furniture by the bankrupt was not in pursuance of the trusts of the settlement, it being a breach of trust by the trustees to permit that to be done. As to the argument that the third fiat is void, the contrary doctrine prevails in this Court and in the other courts of equity (*c*), whatever may be the opinion of the courts of law. (*d*)

The CHIEF JUDGE: — On the question, whether a third commission or fiat be valid when 15*s.* in the pound is not paid under the second, it appears to me clear that the doctrine of the courts of equity is correct, and that such third fiat is valid; but I deliver no judgment upon that question. Strictly speaking, there may have been a breach of trust; but if so, it is a question between the trustees and their cestuis que trusts; not between the petitioners and the respondents. The

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(*a*) Under 6 Geo. 4, c. 16, s. 72.

(*b*) See the cases in support of that doctrine collected *ex parte Welsh, Mont.* 276.

(*c*) See *ex parte Welsh, Mont.* 276. See *postea, ex parte Hawley.*

(*d*) See the cases at law cited in *ex parte Welsh, Mont.* 276.



house itself was clearly not in the order and disposition of the bankrupt; and the furniture was necessary to the beneficial enjoyment by the wife of the house, of which she was in possession as well as her husband.

1835.

*Ex parte*  
ELLISTON.  
In the matter  
of  
BLOXHAM.

*Sir John Cross* : — Down to the third bankruptcy the trustees were the true owners, and the assignees have not made out the facts constituting their title; viz. that the bankrupt actually had the order and disposition, or was reputed owner of the property.

*Sir George Rose* : — The cestui que trust is entitled to consider chattels taken in consideration of trust money as fixed with the trusts of the money. The third commission is perfectly good to enable the assignees under it to raise questions as to reputed ownership or order and disposition. But in this case where is the “consent of the true owner?” Even suppose this had been the property of the bankrupt, then the assignees under the second commission would be the “true owners,” and their “consent” is, not to the possession of the bankrupt, but of the trustees. But independently of the settlement, may not a contract be raised, on the part of the trustees, to take these chattels bound with a trust in favor of the infants? It is true there may be a breach of trust as regards the settlement, but in that case the “consent” of the infants is wanting. Consequently, whether the property be the bankrupt’s or be not, there is no order and disposition. Ever since *Sir G. Plummer’s* act you may follow trust money into whatever property it may be changed.

Ordered as prayed. Costs of each party out of the estate.



C. of R.  
*April 22*  
*and June 2,*  
 1835.

A composition creditor who receives an assignment of debt as security for the composition is not, when the old debt revives, entitled to retain the debts on a question of proof.

Cross, J.,  
 diss.

*Ex parte* ELLIS. — In the matter of CHITTY.

THIS was the petition of *Ellis* and others, assignees of Sir *G. Duckett* and Co., bankers, praying the usual sale of certain securities deposited by *Chitty* with *Duckett* and Co.

A fiat issued against *Duckett* and Co. in March 1832, and the petitioners were chosen assignees. *Chitty*, in 1820, opened an account with *Duckett* and Co., and at their bankruptcy was indebted to them in 22,839*l.* As security he had deposited with them various deeds, bonds, warrants of attorney, policies of insurance, bills, promissory notes, and other securities. *Chitty* being unable to pay this 22,839*l.*, the assignees of *Duckett* agreed to accept a composition of 7,500*l.*, to be paid by instalments. *Chitty* proposed to secure the same by an assignment of various debts due to him, and by an indenture dated June 1832 he assigned to the assignees of *Duckett*, in consideration of 10*s.*, several debts therein mentioned, to hold to the assignees, subject to certain prior incumbrances, subject to a proviso for redemption on payment of 7,500*l.* and interest at the times therein mentioned. Default was made in payment of the instalments, and the assignees of *Duckett* did not receive any sum under the indenture of June 1832. In November 1832 a fiat issued against *Chitty*.

*Chitty* filed an affidavit stating that it was expressly agreed between him and the assignees of *Duckett*, that on payment of the 7,500*l.* to them at the periods aforesaid they would accept the same in full satisfaction and discharge of the 22,839*l.*, and that thereupon they would not only release him, but also deliver to him the several securities deposited (or account for the same as part of



the composition); it being the clear and distinct understanding between him and the assignees that no greater or other sum should be paid in the whole, in discharge of the said debt, than the composition of 7,500*l.*, provided the same was paid at the proper periods.

1835.

—  
*Ex parte*  
ELLIS.

In the matter  
of  
CHITTY.

Mr. *Montagu* for the petition:—As the deed does not contain any release of the original debt, and the debtor has not performed the engagement into which he entered, the petitioner may, if he think proper, insist on being remitted to his original debt. The question is, whether he can insist upon this, and at the same time retain the security received under the deed, and apply the proceeds, so far as they will go, in diminution of the original debt, and prove for the residue? At law, it is clear the debtor could not insist on a return of his security without showing a compliance with his engagement on which the creditor consented to accept the security, and give time; nor could the debtor have any relief in equity which would not interfere with the arrangement between the parties, as in cases of composition the rule is *cujus est dare, ejus est disponere*: when a creditor takes part instead of his whole debt he may restrain and qualify his rights as he pleases, *Sewell v. Meeson* (a), and a variety of other cases. Such would have been the situation of the parties if there had been no bankruptcy. In bankruptcy the law is the same. In *ex parte Vere* (b) the creditors consented to take a composition payable by notes at different dates, with a proviso, that the composition deed should be void, and the creditors entitled to retain whatever they might have received, if the instalments were not paid. The

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(a) *Sewell v. Meeson*, 1 *Vern.* 210.

(b) *Ex parte Vere*, 1 *Rose*, 281.



1835.  
 —  
*Ex parte*  
 ELLIS.  
 In the matter  
 of  
 CHITTY.

first instalment note was paid when a commission issued, and it was held that the creditors might retain the property recovered under the deed, and prove the remainder of their original debt. In *ex parte Reay* (a) a creditor consented to accept a composition of 1,750*l.* by instalments secured by bills payable at different periods, and the assignment of a bond for 3,000*l.*, with a proviso, that if the instalments were not duly paid the deed should be void: only one of the instalments was paid, when a commission issued against the debtor; and it was held that the creditor was entitled to retain the bond, and also to prove the whole debt. In the case now before the Court the creditor says, "I give time to my debtor, on condition that he pays me 7,000*l.*, and deposits with me certain securities;" he has not performed it, and now desires that his security may be returned.

Mr. *Swanston* for the assignees: — The case of *ex parte Vere* (b), a decision which excited some surprise in the profession, is founded on very subtle reasoning, and not at all analogous to the present case; and in *ex parte Reay* (a) the Court was not called on, as it now is, to declare that the petitioner is entitled to retain the security.

Sir *John Cross*: — It is a very important question, and ought, as indeed all questions ought, to be fully heard, and deeply considered. Without venturing to say what my judgment ultimately may be, I must say, that at present I cannot distinguish between the right to retain

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(a) *Ex parte Reay*, 2 *Mont. & Ayr.* 55.

(b) *Ex parte Vere*, 1 *Rosc.* 281.



money or a bond, and the right by the present petitioner to retain the security which he has received. The creditor gave time to his debtor, on conditions which the debtor has violated ; what right, then, has he to call for a return of the security? Such is my present view of the case ; but I repeat, that I wish time to deliberate before I declare my ultimate judgment.

1835.  
—  
*Ex parte*  
ELLIS.  
In the matter  
of  
CHITTY.

The Chief Judge and Sir G. Rose intimated that they were of a different opinion ; and the Chief Judge said, that neither *ex parte Vere* (a) nor *ex parte Reay* (b) had any application, and that he suspected there was some mistake in the statement of facts in *ex parte Reay* (b), in which case the Court had expressly said, that no evil could ensue, as the decision there would not prevent the assignees from bringing an action for recovery of the bond ; but that in the present case the Court was called on to sanction the retaining the bond security, by ordering a sale, and to direct the assignees to join in conveyance, but that, in consequence of the doubts of Sir John Cross, the Court would deliberate on the point.

Mr. Montagu : — Will your Honor pardon me if I say I believe the case of *ex parte Reay* (b) to be correctly stated? but in consequence of your Honor's statement the deed in that case shall be appended in a note to the report of this case. (c)

*Cur. ad. vult.*

This day judgment was delivered.

June 2.

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(a) *Ex parte Vere*, 1 *Rose*, 281. his judgment, confirms the state  
(b) *Ex parte Reay*, 2 *Mont. & Ayr.* 33. of facts in *ex parte Reay*, ante 33, the reporters have not thought  
(c) This was so said in argument ; but as the Chief Judge, in it right to make the insertion mentioned.



1835. The CHIEF JUDGE : —

—  
*Ex parte*  
 ELLIS.  
 In the matter  
 of  
 CHITTY.

In this case the question was, whether the petitioners were entitled to avail themselves of the assignment of debts mentioned in the petition, in addition to the securities lodged with Sir *George Duckett* and Co. before their bankruptcy, and whether they might also prove the balance due on the original debt, after deducting the value of those debts and securities, there not having been any release by deed of the original debt, but merely a conditional engagement to release upon the payment of the composition at the times stipulated. I never entertained a doubt that upon the failure of the condition the petitioners were entitled to treat the agreement for a composition as a nullity, and to be admitted as creditors to the full amount of the original debt. If, however, they elect to set aside that agreement, they must, I think, give up whatever securities they hold by virtue of the agreement which they thus abandon. But the counsel for the petitioners contend, that according to decided cases they have a right to repudiate the composition, and still retain those debts which have been assigned as security for such composition : a position which appears to me untenable, and not warranted by the cases relied upon. The first was *ex parte Vere* (a), where the petitioners had executed a deed by which they consented to accept a composition of 10s. in the pound, payable by instalments ; and at the time of the bankruptcy the first instalment had been paid, but the notes given for the second instalments had been dishonoured ; and the petitioners claimed to retain the instalment they had received, and to prove for the residue of their original debt ; and Lord *Eldon* held them entitled so to do upon the plainest and soundest

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(a) *Ex parte Vere*, 1 *Rose*, 281.



principles, because it was, by the deed under which they accepted the composition, expressly stipulated, that in case of default in payment of any of the notes given for the composition the creditors should be entitled to be paid the full amount of their original debts then due, after deducting such sums as they should have received; and therefore Lord *Eldon* said: "If this has been a payment according to the deed, they are entitled to retain it. If it has not been according to the deed, then it has been in part payment of these debts." In that case, therefore, whether the question were considered with reference to the deed or with reference to a still subsisting contract, or even without reference to the deed, looking to the simple fact of the creditor, without fraud, having received the money of his debtor before the bankruptcy, he was still entitled to retain it; in the first alternative, by virtue of the express stipulation of the deed itself; in the second, by virtue of that general rule of law which enables a creditor to apply in part payment of his debt any monies of his debtor that may come to his hands without fraud, and not specifically appropriated to other purposes, and especially by those provisions in the bankrupt laws which declare the balance of mutual demands to be the amount provable under the commission.

The case of *ex parte Wood* (a) recognized the latter principle, and held that the payment was protected, notwithstanding a previous secret act of bankruptcy. The case of *ex parte Reay* (b) was one in which the commissioners had refused to admit the proof of the debt unless the creditors first gave up the bond of 3,000*l.*, which had been assigned to them by the bankrupt at

1835.

—  
*Ex parte*  
ELLIS.  
In the matter  
of  
CHITTY.

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(a) *Ex parte Wood*, 4 *Dea. & Ch.* 508.

(b) *Ex parte Reay*, 2 *Mont. & Ayr.* 55.



1835.

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*Ex parte*  
ELLIS.In the matter  
of  
CHITTY.

the time of their consenting to the composition ; and the Court thought they ought not to make the delivery up of the bond a condition precedent to such proof. The bond in that case was not assigned as a security for the payment of the composition, neither did the creditors seek the assistance of the Court to enable them to enforce the bond against the obligor. The case was simply this : a creditor, having in his possession property that had once been the bankrupt's, and which was claimed by the assignees, sought to prove his debt under the commission, and was rejected, unless he gave up the property in dispute, which the Court thought was a question to be decided either in an action or on a petition to stay the dividend, but not on a petition for proof. But the petitioners in this case are not simply seeking to be admitted as creditors upon an acknowledged debt, neither is the contest respecting their right to retain any sum of money in their hands as part payment of their debts, but on their right to retain securities. This gives rise to a very different question from any of those agitated in the cases relied upon. The right claimed by the petitioners must rest either upon their contract with the bankrupt, or upon some general principle of law independent of that contract. The contract is this:—*Chitty* being indebted to the assignees of *Duckett* in 22,000*l.*, the assignees undertake, in consideration of an assignment to them by *Chitty* of certain debts owing to him, as a security for the sum of 7,500*l.*, to accept that sum in full satisfaction of their whole demand, upon the express condition that the sum shall be paid by instalments at fixed periods. This contract was not reduced into writing, but its existence is admitted, and in part performance of this agreement a deed was executed by *Chitty*, by which, after reciting that several persons named therein were



indebted to a large amount, and that he had agreed to assign these debts, subject to certain prior charges thereon, to the petitioners for securing to them 7,500*l.* by instalments therein specified. *Chitty*, by assignment, constitutes the petitioners his attornies to recover those debts in his name, and apply them in payment of the 7,500*l.* There is also a covenant by *Chitty* to pay the instalments, and a proviso that upon payment of the 7,500*l.* the deed shall be void. It is to be observed, that there is no mention in this deed of the existence of any larger debt, nor are the terms of the agreement to assign those debts as a security. There is nothing, however, in the deed inconsistent with the alleged contract; nor, taking the agreement and the deed together, is there any stipulation, that in case of nonpayment of the instalments the assignment of the debts should be void; nor, on the other hand, that if the condition should be broken, and the assignees of *Duckett* should revert to their original debt, they should be at liberty to retain the securities given for the composition. The contract is altogether silent as to what shall be done with the debts assigned if the instalments are not paid, and the petitioners should thereupon elect to proceed for the whole of their original debt. The first question, therefore, for the Court to decide is, whether any contract, either to retain or relinquish the assignment, can be implied from the circumstances; and I confess I find no grounds from which I can infer any contract either way: this event appears to have been unanticipated and unprovided for. This brings us then to the question, whether there be any general principle of law, independent of any contract between the parties, by which the petitioners are justified in repudiating the contract for the composition, and yet retaining the securities given as a consideration for that composition. The

1835.

*Ex parte*  
ELLIS.

In the matter  
of  
CHITTY.



1835.

—  
*Ex parte*  
ELLIS.  
In the matter  
of  
CHITTY.

cases cited afford no such principle; for the distinction between a creditor's right to retain money in his hands in part payment of his debt, and his right to retain as security for his debt the deeds and property of his debtor in his possession, is well defined and known. When, as I have stated, a creditor has money in his hands belonging to his debtor, if it have been obtained without fraud, and not specifically appropriated to other purposes, the creditor may apply it in part discharge of his debt; but to enable a creditor to retain deeds or property of his debtor as a security for his debt, he must have a lien thereon either at common law or by contract. There is nothing in the relation in which the parties stand to each other that gives a lien in this case, unless it arises upon the contract under which the assignment of the debts was made; but if the petitioners elect to repudiate that contract, and to revert to their original claim, then, as it appears to me, they must repudiate *in toto*, and abandon their claim to the debts assigned, to which they have no claim except by virtue of that contract. The petitioners, therefore, may either have the usual order for the valuation or sale of the securities deposited with Sir *G. Duckett*, and for proof of the balance, delivering up the deed of assignment to be cancelled, or they may include the debts assigned in their valuation, and prove for the balance of the 7,500*l*.

Sir *John Cross* :—In this case the bankrupt being indebted to the petitioners in a large sum, they verbally agreed to accept about one third part of the debt in lieu of the whole, to be paid by two instalments, and then to give a release; and for securing payment on the appointed days the debtor agreed to assign certain debts owing to him, and he accordingly executed, not a



composition deed, but a simple deed of assignment of these debts, empowering the petitioners to sue for the same; and it was to be void on payment of the instalments. But the deed makes no mention of composition, and purports, on the face of it, to be a security for two instalments in part payment, and not in full satisfaction of the debt. The instalments became due before the bankruptcy, but no part thereof has been paid, nor has any thing been recovered under the deed, which turns out to be an inadequate security for the instalments. The petitioners thereupon claim to be admitted creditors for their entire debt, after deducting the value of the security. On the other hand, it is contended that they must surrender the security if they claim the whole debt. In the first instance, the petitioners, being already entitled to prompt payment or security to the full amount of their whole debt, voluntarily agreed to forego two thirds of it, and accept a security for the residue; they also agreed to give a certain time for its payment; but they obtained by the bargain no advantage whatever to which they were not before legally entitled. The debt was not thereby extinguished, nor was one debt substituted for another; the debt was still the same identical debt, whether it should be ultimately payable in full or in part only; that alternative was at the option of the debtor. But it is clear that between the execution of the deed and the time appointed for payment it was not in his option to rescind the deed, much less could it be so after he had made default, and gained the advantage of time for the payment. That would be to make the deed void by nonpayment, while the deed itself provides it shall become void upon payment. It appears to me, therefore, that the deed, after the default of the debtor, and prior to his bankruptcy, was still in full force as a security for the subsisting debt,

1835.

*Ex parte*  
ELLIS.

In the matter  
of  
CHITTY.



1835.

—  
*Ex parte*  
ELLIS.  
In the matter  
of  
CHITTY.

and that these creditors were then entitled to maintain an action at law for the whole debt; that a Court of Equity would not then have compelled either a stay of the action or a surrender of the security. If, then, before the bankruptcy these creditors were legally and equitably entitled to their whole debt, and to the benefit of the security, they have the same right still, for it is a general rule, that bankruptcy does not in this respect alter the rights and duties of the debtor and creditor; and it is another general rule, that a creditor, having a security on the property of the bankrupt, may avail himself of the security in reduction of his debt, and be admitted to prove for the residue. The petitioners claim the benefit of this rule, and it seems to me they are entitled to it. The case that most nearly resembles the present is *ex parte Vere*. (a) There the debtor executed a general composition deed for the payment of a lesser sum by instalments, and his creditors covenanted on payment thereof to release their debtor. He paid the first instalment, but made default in payment of the second, and then became bankrupt; and the question was, whether the creditor should be admitted for the whole debt, deducting the instalment paid, or for the whole, returning the instalment; and Lord *Eldon* there decided that he should retain it, and be admitted for the residue. The claim seems to be the same in the present case, for I see no difference in principle, whether it is a sum of money or a security that is given in part performance of a bargain for a composition; both being alike given in part satisfaction for the original debt, both may, I think, be retained to that end.

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(a) *Ex parte Vere*, 1 *Rose*, 291.



Sir *George Rose* said he had nothing to add to what fell from him on the hearing, and that he concurred with the Chief Judge.

1835.

*Ex parte*  
ELLIS.

In the matter  
of  
CHITTY.

Mr. *Montagu* : — The petitioner elects to give up the security in question, and will value the other securities at 1,000*l.*, and prove for the difference in the usual manner.

*Ex parte* FORTH. — In the matter of TILSON.

C. of R.  
*June 6,*  
1835.

THE petitioning creditor had paid a creditor (a servant) his debt in full (namely, half a year's wages), in order to render him a competent witness to depose to the requisites. This was a petition that he might be allowed that sum out of the estate.

A petitioning creditor is entitled to be repaid out of the estate a sum paid to a creditor to render him a competent witness to support the fiat.

Mr. *J. Russell* for the petition.

Ordered. (*a*)

*Ex parte* LAING. — In the matter of  
DUDDERIDGE.

C. of R.  
*June 10,*  
1835.

THIS was the usual petition of an equitable mortgagee by deposit of title deeds, for a sale, &c. of the premises, &c. The petitioner was a solicitor, and the deposit of the deeds was to secure his bill of costs already incurred, and also to secure such costs as might be thereafter incurred.

A solicitor cannot receive a deposit of title deeds as security for future bills.

Mr. *O. Anderdon* for the petition.

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(*a*) An affidavit of service on the assignees was produced.



1885.

Mr. *Bethell*, for the assignees, objected, that the security was bad, as regarded future bills.

*Ex parte*  
LAING.

In the matter  
of  
DUDDERIDGE.

*Per Curiam* : — The security is bad as to the future bills of costs. A solicitor cannot take a security for bills before they are delivered; it was so held by Sir *John Leach* in *ex parte Bovill*. (a)

C. of R.  
June 17,  
1835.

On a petition  
to surrender  
where there is  
no wilful default  
costs come out  
of the estate.

*Ex parte* SMITH. — In the matter of SMITH.

MR. *SMYTHE* : — In this case the fiat issued while the bankrupt was abroad. He did not hear of it soon enough to surrender in time. He is now in England, and anxious to surrender. This is the usual petition for leave to surrender after the expiration of the forty-two days, and it is hoped the bankrupt will be allowed his costs out of the estate.

*Per Curiam* : — Where the surrender is for the benefit of the estate, and there is no fraud or default on the part of the bankrupt, it is of course for him to take his costs out of the estate. (b)

(a) In *ex parte Bovill re Evans*, August 1826, Sir *John Leach* decided, that an equitable mortgage to a solicitor would not cover bills of costs not delivered when the equitable mortgage was made. *Reg. Lib.*

(b) In this case the costs were reserved, it being doubtful whether they should come out of the joint or separate estate.



*Ex parte* HANKS. — In the matter of HANKS.

C. of R.

June 17,

July 17, 18,  
1835.

MR. O. ANDERDON: — This petition was not served four days before the time for which it was answered, which the general order requires. (a) This is an application in pursuance of *ex parte Beardsworth* (b), that the time for which the petition was answered may be enlarged.

When a petition is not served within the proper time it must be re-answered.

*Per Curiam*: — Where the time within which a petition must be served has elapsed without its having been served, the petition must be re-answered, and it will be of course at the office to re-answer, under such circumstances. If there were still time to serve the petition, the Court would enlarge the time for which it is answered as of course; but when the time for service has elapsed the petition must be re-answered.

If the time has not elapsed, it may be enlarged.

Mr. O. Anderdon: — This is a petition to supersede. Will the Court require personal service on the assignees?

*Per Curiam*: — If the petition be merely to supersede, the assignees need not be personally served, as the petitioners do not ask an order, disobedience to which would bring the respondents into contempt.

A petition to supersede need not be personally served on the assignees.

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(a) The petition to be served presented to stay the certificate.—Orders, Court of Review, four days before the expiration of the time at which the attendance thereon is ordered, except in the case of a petition January 17, 1832.

(b) 1 *Dea. & Ch.* 369.



C. of R.  
June 17,  
July 17, 18,  
1835.

A builder is a  
person who  
builds either on  
his own or  
another's land  
for profit.

*Ex parte* NEIRINCKX.—In the matter of  
NEIRINCKX.

*NEIRINCKX* was discharged from the King's Bench, having about 200*l.* in his possession. He forthwith took a lease of a piece of ground, and the carcasses of six unfinished houses standing thereon, and entered into contracts with *Scales*, a plasterer, and *Wilson*, a builder, to finish the six houses. *Wilson* being unable to finish the brickwork, it was finished by *Scales*. *Neirinckx* paid money weekly to *Scales* for the wages of the men.

A fiat was issued against *Neirinckx* as a "builder" by *Scales*. This was a petition to supersede, for want of a good petitioning creditor's debt, and for want of a trading.

One of the affidavits in opposition to the petition stated, that *Neirinckx* had called at the deponent's shop about the purchase of ironmongery for the houses, and had then stated that he was a builder. Another affidavit stated, that *Neirinckx* had told deponent that his intention was to sell some of the houses when completed, and that he expected, by so doing, to realize a sum which would enable him to commence another building speculation, at a newly discovered mineral spring at Chesham in Buckinghamshire.

In reply the bankrupt deposed, that he never intended to sell the houses, and that he intended the house in Buckinghamshire for his residence. Affidavits were also filed by other persons, stating that *Neirinckx* was never known as a builder, and that he was totally ignorant of that trade, and that he had never entered into those contracts which builders invariably did for performing certain portions of work, and for the pur-



chase of and sale of materials, and that *Neirinckx* was believed by the deponents to be a gentleman finishing the houses as his own property.

1835.

—  
*Ex parte*  
NEIRINCKX.  
In the matter  
of  
NEIRINCKX.

Mr. *Swanston* and Mr. *Sturgeon* for the petition:— The question is, whether the petitioner is a “builder” within the 6 Geo. 4, c. 16, s. 2. Mr. *Neirinckx* built on his own land; a builder is a person who builds for others. If *Neirinckx* were a trader because he built, *Burgess* (a) would have been a trader because he made bricks. *Burgess* was held no trader, because the brick-making was on his own land. [The CHIEF JUDGE:— The 6 Geo. 4, c. 16, s. 2, does not expressly mention brickmakers, but it does expressly include builders.] Yes, but the word “builder” must be reasonably construed, otherwise any nobleman who builds on his estate for the purpose of better enjoying that estate would thereby become liable to the bankrupt laws. In *Williams v. Stephens* (b) Lord *Ellenborough* held, “that a building on a man’s own land, for whatever purpose, could not be considered a buying and selling.” After that case was decided, 6 Geo. 4, c. 16, s. 2, made “builders” liable to the bankrupt laws; but that is, not any person who may build a house, but those who are technically called and known as builders, and who would be ranged under the head “builders” in a trade directory. *Neirinckx* only hired other persons to build for him on his own land; he would not have undertaken to build for any person.

Mr. *Twiss* and Mr. *Biggs* for the assignees:—Almost every professed builder has land of his own on which

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(a) *Ex parte Burgess*, 2 Gl. & J. 183.

(b) *Williams v. Stephens*, 2 Camp. 300.



1835.

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*Ex parte*  
 NEIRINCKX.  
 In the matter  
 of  
 NEIRINCKX.

he builds. The intent of *Neirinckx* was not to improve his own land, but to gain a living. He came out of the King's Bench with only 200*l.* in his pocket, and immediately took a lease of the land, with carcasses upon it, which he bought, and finished with an intent to sell again. [The CHIEF JUDGE:—Are there any affidavits that the transaction was intended to be a single isolated transaction, without any intent, if opportunity offered, of continuing?] No such affidavits have been made, but can be made.

The CHIEF JUDGE:—A gentleman who builds in order to improve his estate, and afterwards happens to sell or let the houses, is not a builder within the act; but that is not the question before the Court. Here a man comes out of prison, possessing 200*l.*; he has no land of his own, but takes a lease of land with carcasses of houses, and finishes them with intent to dispose of them at a profit; he is therefore a builder, unless the petitioner can vary the case by new affidavits.

Sir *John Cross* declined for the present to deliver any judgment, as the petition was to stand over.

Sir *George Rose*:—I agree with the Chief Judge that the petitioner is a trader within the act; he would be so as seeking to gain his living by the “workmanship of goods,” even if he were not directly within the term “builder.” ~~He~~ usually have some interest in the land on which they build, but are not less within the statute on that account. All persons building on their own land are within the act, if their principal intent is to obtain profit. But a party is not within the act where his building on his own land is for



the purpose of improving his property, and is an incident, and accessory to the better enjoyment of the land. In this Court the onus lies with the bankrupt to prove he is not within the act; at law it lies with the assignees to prove he is. After the intimation of the opinion of the Court, if the bankrupt files further affidavits, and still fails, he may perhaps be visited with costs.

1835.

*Ex parte*  
NEIRINCKX.  
In the matter  
of  
NEIRINCKX.

Petition to stand over, with liberty to file affidavits.

This day the petition again came on. The question as to the petitioning creditor's debt was discussed, but was a question of fact.

July 17.

The arguments being concluded, this day judgment was given as follows:

July 18.

The CHIEF JUDGE:—The petitioner is a builder, and properly adjudged a bankrupt. Before the 6 Geo. 4, c. 16, passed it was doubtful whether a builder could be made a bankrupt, till *Williams v. Stephens* (a) decided that he could not, if he had an interest in the land, and merely worked up materials into houses in order to improve his land; but before 6 Geo. 4, if a common builder, who had no interest in land, had bought materials and built houses, he would have been a trader; then the 6 Geo. 4, c. 16, uses the word "builder" just as innkeepers are expressly included. It is therefore clear that the legislature intended to include all builders, whether they built on their own land, or upon land on lease, or otherwise. The most common way in which a builder exercises his trade is

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(a) *Williams v. Stephens*, 3 Camp. 300.



1835.

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*Ex parte*  
 NEIRINCKX.  
 In the matter  
 of  
 NEIRINCKX.

to take land on a building lease, and build thereon ; builders also build on the land of other persons. It appears all these are included in the act, which was intended to embrace every mode by which a building speculation is carried on ; it therefore comes to a question, whether *Neirinckx* is within any of these cases. On the evidence, the Court can come to no conclusion but that he was a builder. He, looking about to see how he could best invest his capital, resolved on the mode in question. If he had intended merely to finish and dispose of the six houses, and stop there, he would not be within the act, as that would be merely embarking in one single speculation to improve his land ; but the evidence proves that he did not intend this alone, but that this was only a beginning, and with the profits of this building speculation he intended to carry on other building speculations.

*Sir John Cross* : — The act emphatically intended to include this particular class of builders to which the petitioner belongs, he being a builder intending to carry on trade to gain a profit.

*Sir George Rose* : — The question in these cases is, whether the acts of the party come within the intent of the statute of being a builder, with an intent to gain a profit and livelihood thereby ? I need not, in this case, say more than that in my opinion the case is so far one of doubt that this Court ought not to supersede against the decision of the commissioner, when by so doing we deprive the petitioning creditor of the legitimate mode of trying the question in a court of law, where the bankrupt may bring an action, though we refuse to supersede. I am of opinion that the mere fact that a party builds on his own land is not enough to exempt



him from the operation of the act; but as the point is not directly before me, I only state my present impression. In this case I can feel no doubt which prevents my declaring that he is within the intent of the act.

1835.

*Ex parte*  
NEIRINCKX.  
In the matter  
of  
NEIRINCKX.

The order was,—the petitioner submitting by his counsel to abide by the judgment of the Court, and undertaking not to bring any action to try the validity of the fiat (*a*),—refer to Mr. *Gregg* to inquire if the petitioning creditor has any and what debt sufficient to support the fiat; reserve further directions and costs. Any party to be at liberty to apply. Suspend all further proceedings under the fiat till further order.

*Ex parte* TELFOURD.—In the matter of  
DAVIS.

C. of R.  
July 17,  
1835.

IN this case the Chief Judge said, that for the future, unless there were very special reasons to the contrary, when application was made to postpone a petition in the paper of the day, it should stand at the bottom of the general paper, and not stand over to any particular day; and that, to postpone the hearing to any particular day, the application must be made the day before the petition would be in the paper for hearing.

Application for  
petition to stand  
over should be  
made the day  
before the peti-  
tion appears in  
the paper.

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(*a*) Quere as to the right so to stipulate?



C. of R.  
July 18,  
1835.

The Court cannot compel a commissioner to adjudicate a man a bankrupt; it can only order him to proceed.

The non-possession of property by the bankrupt is not a sufficient reason for not declaring him a bankrupt.

*Ex parte* JOHNSTON. — In the matter of JONES.

THE petition stated, that at the meeting to open the fiat, Mr. Commissioner *Fonblanque* was dissatisfied as to the petitioning creditor's debt, and adjourned opening the fiat. On the day to which the meeting was adjourned the commissioner asked the petitioning creditor whether the supposed bankrupt had any property, when the petitioning creditor answered, he did not know; that he had heard the bankrupt had a little, but to what amount he could not state; that it might be under 20*l*. The commissioner then refused to receive the deposition, on the ground that the petitioning creditor could not state that the proposed bankrupt possessed any property.

On the 17th of June the petitioning creditor petitioned this Court to remove the fiat to another commissioner; but the Court refused the order, as the affidavit in support did not state clearly that the commissioner refused to receive the deposition of the petitioning creditor, on account of the bankrupt having no property, and suggested that another application should be made to the commissioner, which might prevent the necessity of again coming before the Court; but that, in the event of its being made clear that the want of property was the ground on which the commissioner proceeded, the Court gave leave to bring the petition on again.

The solicitor to the fiat thereon wrote to the commissioner, stating that the Court were of opinion that if its intimation were conveyed to the commissioner he would proceed with the fiat.

The commissioner stated, he could not receive any private application; whereon the solicitor attended the



commissioner, and produced Mr. *Girdlestone's* brief, and the indorsement thereon; when the commissioner objected, that he had no official communication from the Court of Review. (a)

The solicitor then asked whether the commissioner declined to proceed on the ground that the deposition of the petitioning creditor was bad, or because of the want of property; when the commissioner said he had already given his answer, and should give no other, but that if the Court made an order he should submit.

Mr. *Girdlestone jun.* now applied for an order on the commissioner to proceed to the adjudication.

The CHIEF JUDGE:—The Court cannot order the commissioner to adjudicate (b); but can direct him to consider whether the evidence is sufficient to enable him to declare the party bankrupt.

*Per Curiam*:—The registrar will communicate the opinion of the Court, that the commissioner should proceed. If the commissioner prefers an order, one shall be made.

1835.

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*Ex parte*  
JOHNSTON.  
In the matter  
of  
JONES.

*Ex parte* WARD.—In the matter of JORIE.

THIS case was called on upon a former day, when all parties were present, and stood over to this day by arrangement.

This day Mr. *Tennant* appeared for the respondents. The petitioners did not appear, but no affidavit of service was in Court.

C. of R.  
July 18,  
1835.

When a petition stands over by arrangement, an affidavit of service is not necessary.

(a) See *ex parte* Nokes, 1 Mont. & Ayr. 463.

(b) *Ex parte* Perrin, Buck. 510. *Ex parte* Stead, 1 Gl. & J. 510.



1835.

*Ex parte*  
WARD.  
In the matter  
of  
JORIE.

*Per Curiam* : — As the petition stood over to a particular day by an arrangement made when the petitioner was present, an affidavit of service is not wanting. As the respondent is present, and the petitioner is not, this petition must be dismissed with costs.

C. of R.  
July 21,  
1835.

*Ex parte* HALL. — In the matter of IVESON.

A bankrupt sequestrator will be restrained from receiving any proceeds adversely to the assignees.

A DEBT being due from a clergyman to *Iveson*, the latter procured a sequestration, and was appointed sequestrator thereunder, and then a fiat issued against *Iveson*. This was a petition, stating that *Iveson* threatened and intended to receive and appropriate the proceeds of the sequestration, and that he would do so before the assignee could procure another sequestrator appointed, as the process would be attended with much expense and delay. The bankrupt had not obtained his certificate.

Mr. *Bethell* for the petitioner.

Mr. *W. R. Ellis*, *contra*, for the bankrupt.

*Per Curiam* : — Restrain the bankrupt from releasing or doing any other act to discharge the sequestration, and from receiving or demanding any thing under the same. Let the assignees be at liberty to use the name of the bankrupt under the existing sequestration, if necessary, and let the bankrupt pay over to his assignees any thing that may have been received by him since his bankruptcy under or by virtue of the sequestration. Costs of this petition out of the estate.



*Ex parte* CROSBIE. — In the matter of JOHN KIDDER.

C. of R.  
July 22,  
1835..

IN 1813 *Thomas Kidder* lent *John Kidder* 300*l.*, who gave *Thomas Kidder* a bond for the amount, and deposited certain title deeds by way of equitable mortgage as additional security. In 1815 two other bonds were given to secure 1,000*l.* and 305*l.*, and a mortgage was given for 300*l.*

Upon a composition, the original debt revives, upon failure of the debtor in performing his undertaking, or upon *bond fide* reviving the old debt.

In 1816 *John Kidder* entered into a composition with his creditors, to which *Thomas Kidder* was a party. The material part of the deed was as follows: “Mem. We, &c., do hereby, for ourselves, &c., agree to accept from *John Kidder* at and after the rate of 10*s.* in the pound upon our respective debts, such composition to be paid us in the proportion following; (that is to say,) 2*s.* 6*d.* in six months, 2*s.* 6*d.* in twelve months, 2*s.* 6*d.* in eighteen months, and 2*s.* 6*d.* in twenty-four months, from the date hereof. And it is hereby agreed, that the four several instalments shall be secured to us by the promissory notes of the said *John Kidder*; and we do hereby severally agree, that we will receive the said promissory notes in full discharge of our debts, and upon the delivery of the said several promissory notes we will forthwith execute to *John Kidder* a release for our debts. And it is hereby agreed, that if all the creditors whose debts exceed 500*l.* do not accede to this arrangement within one month from this time the whole to be void; and that if *John Kidder* fail in making good all the said instalments, or any thereof, that each of the said creditors shall remain creditors for the full amount of their debts.”

*John Kidder* never performed this agreement as to



1835.

—  
*Ex parte*  
 CROSBIE.  
 In the matter  
 of  
 JOHN KIDDER.

*Thomas Kidder*, or gave any notes in pursuance thereof, but afterwards paid various sums on account of interest on the bonds, which payments were indorsed on the bonds. *Thomas Kidder* died in 1829, leaving the petitioner *Crosbie* his executor.

In 1829 an account was sent by *Crosbie* to *John Kidder* of the sums due to *Thomas Kidder*, who, objecting to the mode in which the interest was calculated, sent an account, in which he debited himself with the full amount of the sums lent.

In March 1835 *John Kidder* was declared a bankrupt.

On tendering proof for the whole sums, the composition deed was objected, and Mr. Commissioner *Fane* decided that the account should be taken on the footing of the composition deed.

The petition prayed that the account might be taken on the footing of the original debt, and the securities sold, &c. in the usual manner.

Mr. *Ching* and Mr. *Koe* for the petition:— The debt is not extinct, for two reasons; the one, that the terms of the composition contract were not performed on the part of *Kidder*; and the other reason, that if they were, yet that the subsequent promise revived the debt. As to *Thomas Kidder*, the composition became a nullity, one of the clauses keeping the debt alive if failure were made in payment of any of the instalments: even if the deed remained good the subsequent acts of *John Kidder* have set up the debt again. In *Thomas v. Courtney* (a) a creditor, having security, signed a composition deed containing a release; and it was held, that he might nevertheless avail himself of his securities,

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(a) *Thomas v. Courtney*, 1 Barn. & Ald. 1.



as the agreement said nothing as to delivery up of securities.

1835.

*Ex parte*  
CROSBIE.

In the matter  
of  
JOHN KIDDER.

Mr. Swanston contra : — *Thomas v. Courtney* (a) is not in favour of the petitioners, as the security there was not the bill of the debtor, but of a third person. In *Cockshott v. Bennett* (b) it was held, that where one of the creditors obtains a bill for the residue of his debt before he executes the composition deed, that such note was void, and a subsequent promise to pay it was also void, being without consideration. A party once bound by a deed of composition must abide by it, and cannot take any steps to recover the debt not warranted by the terms of the deed. The signature of *Thomas Kidder* to the composition deed was essential, he being a large creditor, and the other creditors must have executed under the influence of the signature of *Thomas Kidder*. As *Thomas Kidder* himself took no steps, he cannot take advantage of any laches on the part of *John Kidder*. *Thomas Kidder*, on receiving the notes for 10s. in the pound, would have been bound to give up any security he held; but the commissioner has given him the benefit of the mortgage money to the amount of 10s. in the pound, which places him in the same situation as if he had received 10s. in the pound.

Mr. Ching in reply : — The absence of any previous agreement or fraud takes this case out of *Cockshott v. Bennett* (b).

Their Honors the Chief Judge and Sir *George Rose* appeared to incline to the opinion that the petitioner

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(a) *Thomas v. Courtney*, 1 Barn. & Ald. 1.

(b) *Cockshott v. Bennett*, 2 Ter. Rep. 763.



1835.

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*Ex parte*  
CROSBIE.In the matter  
of

JOHN KIDDER.

*July 30th.*

was not entitled to what he asked; but Sir *John Cross* intimated a contrary opinion, whereon judgment was deferred.

*Cur. ad vult.*

This day judgment was given.

The CHIEF JUDGE : — The petitioner is entitled to the relief he seeks. By the terms of the composition deed, on payment of the notes given by the bankrupt when he entered into the composition, he was entitled to a release from the creditors. No notes were ever given to *Thomas Kidder*, nor does it appear that he ever received any instalments under the composition deed. The other creditors did so, and executed releases; consequently the bankrupt was fully released from all his debts but that due to *Thomas Kidder*; and the reason the latter did not receive notes with the other creditors was because he waived them out of kindness. But though he waived the notes, yet if *Thomas Kidder* had received the instalments with the other creditors *John Kidder* would have been entitled to a release from *Thomas Kidder* also. But no instalment was ever paid to *Thomas Kidder*. These facts induced a suspicion that there existed some collusive agreement at the time of the composition, that *Thomas Kidder* should be paid his debt in full; but the evidence of the bankrupt rebuts that suspicion, and proves that no such agreement was made. After the composition agreement the bankrupt made payments on the original debt to *Thomas Kidder*; besides which *Crosbie* made out a statement of the sums due to his testator *Thomas Kidder*, and the bankrupt did not object that nothing was owing, but only objected to the mode of calculating the interest, thereby acknowledging that the debt was still due. The question is, Upon what terms was all this



done? *Took v. Tuck* (a) shows that an agreement may be made to continue the debt when the release is not absolute. Whether the release be or be not absolute is a question of fact. It appears from the examination of the bankrupt that he intended, when able, to pay the whole debt. If this had been the only condition it might be necessary to show the bankrupt's ability; but in the subsequent transactions the bankrupt never sets up his inability, and he subsequently acted as if the whole debt were due on the bond. I therefore think that the agreement between the parties was, that the original debt on the bond should be kept alive, and therefore that the petitioner is entitled to prove for his whole debt.

1835.  
—  
*Ex parte*  
CROSBIE.  
In the matter  
of  
JOHN KIDDER.

*Sir John Cross* concurred.

*Sir G. Rose* : — This debt existed, not being barred by release, the right to which the bankrupt was entitled to waive, and did waive. I concur in the order.

Proof ordered. Costs of both parties out of the estate.

In this case the examinations of the bankrupt and of another person before the commissioners were proposed to be read, pursuant to notice: It was objected that they were not evidence; but

Practice as to  
reading exami-  
nations taken  
before commis-  
sioners.

*Per Curiam* : — The party intending to read an examination taken before commissioners gives notice of such intent to the other side, who then are entitled to copies thereof, on paying the expenses, or may themselves take copies at their own expense. The examination may then be treated as an affidavit, and may be

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(a) *Took v. Tuck*, 4 Bing. 224. S. C. 12 *Moore*, 435. S. C. *nom. Tuck v. Tooke*, 4 M. & R. 393.



1835.

*Ex parte*  
CROSBIE.In the matter  
of  
JOHN KIDDER.

met or answered by affidavit; or, if considered more expedient, an application may be made to examine the party here *viva voce*; or, lastly, the party may be again summoned before commissioners by the other side, and examined by them, and notice given to read such further examination. (a)

LORDS  
COMMIS-  
SIONERS,  
July 28,  
1835.

Slaves in  
Antigua cannot  
be equitably  
mortgaged by  
a deposit of a  
registered title  
deed containing  
a schedule of  
slaves, if the  
memorandum  
accompanying  
the deposit,  
which is regis-  
tered, do not  
contain a list of  
the slaves.

*Ex parte*  
Rucker, 1 Mont.  
& Ayr. 481,  
reversed.

*Ex parte* BORRODAILE and another.— In the matter  
of DANIEL HENRY RUCKER and others.

THIS was an appeal from so much of the order of the Court of Review as declared the petitioners entitled as equitable mortgagees to the slaves upon the mortgaged plantation. The case is reported in 1 Mont. & Ayr. 481.

The following is an abstract of the material parts of the special case:—

For many years prior to November 1831 *Henry Rucker and Co.* carried on business in copartnership as West India merchants and wool merchants; and as such copartners were seised in fee simple of a plantation in the island of Antigua called Yeaman's, together with the slaves thereon. In August 1831 *Henry Rucker and Co.* applied to *S. Rucker and Son* to lend them 1,000*l.*, and also to accept for their accommodation bills of exchange for 4,000*l.*, which *S. Rucker and Son* agreed to do, on having such equitable mortgage and deposit made to them as herein-after mentioned.

*S. Rucker and Son*, on the 5th of August 1831, lent to *Henry Rucker and Co.* 1,000*l.*, and at the same time accepted for the accommodation of and delivered to *Henry Rucker and Co.*, without receiving any considera-

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(a) See *postea*, *ex parte Chambers*.



tion, three bills of exchange for 1,000*l.*, 1,000*l.*, and 2,000*l.* respectively drawn by *Henry Rucker and Co.* upon *S. Rucker and Son*, and payable to the order of the drawers one month after date. In consideration of such advance and acceptance, *Henry Rucker*, on behalf of himself and partners, on the same 5th of August 1831, signed in the partnership name, and delivered to *S. Rucker and Son*, the following written memorandum or agreement, dated the 5th August 1831:—

“ Messrs. *Siegmund Rucker and Son*.

“ Dear Sirs,

“ In consideration of your having accepted our three several drafts upon you of 1,000*l.*, 1,000*l.*, and 2,000*l.*, dated this day, at one month date, to our own order, due 5—8 September, and at the same time of your having lent us in cash the sum of 1,000*l.*, making together the sum of 5,000*l.*, we hereby deposit and pledge with you the conveyance to us for valuable consideration of the plantation called Yeaman’s, in the island of Antigua, together with the slaves thereon and premises, executed by *Charles Robertson* and *Eliza* his wife on the 10th of July 1827, and recorded on the same day. Further, we hereby promise that we will place in your hands the bills of lading (when received) for colonial produce we expect has been shipped in the *Fairfield*, Captain *Norie*, from the estate of *Queely Shiel*, of *Montserrat*; and further, of shipments we expect will be made on ship or ships from the estate of the late *Dalzell* and *Meyer*, in *St. Vincent*. In the meantime, we hand over and deposit with you three policies of insurance, viz. 3,240*l.*, on produce of which 810*l.* interest is arrived, insured 10th February, per ship or ships from *St. Vincent*; 800*l.*, insured 21st March, per ship or ships from *Montserrat*; 2,000*l.*, insured 6th of May, per ship or ships from *Montserrat*; it being understood

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.



1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.

that the acceptances before described have been granted at our request and for our accommodation; and we promise that previous to their becoming due we will place the money in your hands to meet the same, together with the sum of 1,000*l.*, being the return of the cash received from you this day, over and above the said three acceptances."

The above memorandum or agreement was on the 18th of June 1832 duly registered or recorded in the island of Antigua; but no conveyance or deed or instrument (save the said memorandum or agreement) relating to the premises in the memorandum or agreement contained was ever executed or signed by any person for the purpose of charging the premises, as attempted to be charged by the memorandum or agreement.

At the time of signing the agreement, *Henry Rucker and Co.* deposited in the hands of *S. Rucker and Son* the deeds by which the plantation and premises in the agreement mentioned were conveyed to them.

This deed of conveyance was to be taken and referred to as part of the special case, and was a conveyance of the plantation and appurtenances, including the slaves. To this indenture there was annexed a schedule, in which the registered names and descriptions of the slaves comprised in the indenture were duly set forth. By the law of Antigua all negroes and other slaves were at the times herein mentioned real estate. *Henry Rucker and Co.* were at and prior to August 1831, and continued from thenceforth until their bankruptcy, and their assignees under their commission now are in possession of the plantation and the slaves in the indenture and schedule comprised. On the 17th of November 1831 a commission issued against *Henry Rucker and Co.*, and they were declared bankrupts.

A petition was presented, on the 12th of May 1834,



to the Court of Review, by *S. Rucker and Son*. The petition was heard on the 13th December 1834, when, on behalf of the assignees, it was submitted, that inasmuch as the registered names and descriptions of the slaves were not set forth in the instrument or memorandum of deposit herein-before mentioned, under which instrument or memorandum alone it was contended by the assignees that the claim of the parties presenting their petition to the Court of Review arose, nor in any schedule thereupon indorsed or thereunto annexed, pursuant to the provisions contained in the act 59 Geo. 3, c. 120, the said instrument or memorandum of deposit was not good or valid in law to pass, convey, charge, or affect the slaves, and that the slaves consequently were and remained the property of the bankrupts at the time of their bankruptcy. By an order of the Court of Review, dated the 13th of December 1834, it was declared that the petitioners were equitable mortgagees of the plantation called Yeaman's, with the apprenticed labourers, heretofore slaves, mentioned or comprised in the indenture of the 10th of July 1827 so deposited with the petitioners by the bankrupts. And it was further ordered, that the land, plantations, or estate, together with the right or interest to and in the services of the apprenticed labourers, should be sold.

The special case concluded as follows: "the question is, whether, under the circumstances before mentioned, any interest in the slaves did pass to the mortgagees."

Mr. *Wigram* and Mr. *G. Richards* for the appellants: — The question is, whether, under the provisions of the 59 Geo. 3, c. 120, the decision of the Court of Review is correct. The title of that act is, "An act for estab-

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.



1835.

—  
*Ex parte*  
BORRUDAILL.  
In the matter  
of  
RUCKER.

lishing a registry of colonial slaves in Great Britain, and for making further provision with respect to the removal of slaves from British colonies." The eighth and ninth clauses of the act (*ante*, vol. i. p. 485.) declare, that no deed or instrument, made or executed within the United Kingdom, whereby any slave or slaves in any of the said colonies shall be *intended* to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law to pass or convey, charge or affect, any such slave or slaves, unless the registered name and description of such slave or slaves shall be duly set forth in such deed or instrument, or in some schedule thereupon indorsed or thereto annexed. In this case an attempt was made to create an equitable lien, and an instrument was prepared to effect this, but not in conformity with the provisions of the act. There ought to have been a registration, which ought to have been set forth. The words of the eighth clause of the act distinctly point to this sort of case. It was a mortgage *intended* to be created. The memorandum or agreement was the instrument intended to give a lien. Without it the respondents can claim nothing. The Court of Review held, that by the mere deposit of the deeds an equitable interest in the slaves was raised, and that the contract or agreement might be passed by as nugatory. Sir *George Rose* said, that the act of parliament introduced the necessity of registration as affecting purchasers only, and had no effect to render void agreements between the parties themselves. It is submitted, that the policy of the act was to prevent the importation of slaves into the colonies without the names of the owners being known, and that it was not framed with intent to protect different incumbrancers *inter se*, but to



give protection to the slaves. With respect to the ship registry acts, no legal or equitable interest can be created, unless the provisions of those acts are complied with, *Rollaston v. Hibbert* (a); *Brewster v. Clarke*. (b) The Court of Review, however, has decided that an interest in slaves can be created without the forms prescribed by the act being complied with.

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.

To the deeds deposited there was a schedule, but the deposit was not made until August 1831; the deed containing the schedule being dated on the 10th of July 1827, and recorded the same day. It is not pretended that the slaves were the same at both times. It is submitted that the memorandum or agreement and the deposit formed one transaction, and that the respondents cannot reject the agreement. The petitioner's claim is under the memorandum, and the special case states, "that the said memorandum or agreement was on or about the 10th day of June 1832 duly registered or recorded in the Island of Antigua." The appellants, having themselves registered it, admit that it required registration, and it is void as to the slaves, as having no schedule of them.

Mr. *Wakefield* and Mr. *J. Russell* for the assignees:—  
If a debt exist, an equitable mortgage may be created by a mere deposit of title deeds; no words are necessary. When a memorandum accompanies the deposit, it merely evidences the object of that deposit. In this case, there was a debt at the time of the deposit, and the memorandum merely declares the object of such deposit; it was no agreement or instrument by which

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(a) *Rollaston v. Hibbert*, 3 *Tcr. Rep.* 506.

(b) *Brewster v. Clarke*, 2 *Mcr.* 75.



1835.

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*Ex parte*  
 BORRODAIDE.  
 In the matter  
 of  
 RUCKER.

any interest passed; it was given only as evidence of the deposit and of the amount secured. It was a mere deposit, unaccompanied by an agreement. An agreement to sell a mortgage is not a conveyance, and there is no provision in the act rendering void contracts to sell a mortgage. The ship registry acts were altered to reach agreements to sell or mortgage. In *Rollaston v. Hibbert* (a) it was held that, under the old acts, an attempt to transfer absolutely was void, unless the provisions of the act were complied with. In 1794 the act was altered, and the 34 Geo. 3, c. 68, passed. The eighth section of 9 Geo. 4. cannot be said to extend to an agreement to purchase. In the deed to carry into effect the agreement the names must be registered. The agreement passes no interest or estate without the aid of equity. No right at law passes, and the specific performance of contracts is discretionary with the Court. In this act there is no prohibition against parties agreeing to do certain acts. Is it possible to say that an interest may be created by parol in the slaves, but that if the agreement is reduced into writing not duly made according to the forms of the act the interest is gone? If so, all sales by auction in the island would be avoided; and so would many cases of specific performance in regard to sales of West India plantations. If the decision of the Court of Review be reversed, the slaves would be severed from the land; and this Court will be reluctant to interpret an act contrary to the policy of the island. By the act, it is not the agreement to convey that is made void, but the actual conveyance. If, pending the agreement, execution issued against the slaves, the agreement would have no operation. The question is, therefore, whether any binding agreement for the sale, pledge, or mortgage

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(a) *Rollaston v. Hibbert*, 3 *Ter. Rep.* 506.



of slaves can be made, unless the forms of the acts are complied with, and a schedule added. If so, no parol agreement would be binding, and no lien or interest could be created except by a deed or instrument executed according to the provisions of the act. This was not contemplated, and the act cannot therefore be extended to a case not within it. The appellants claim under the deposit, which gave them an equitable interest in the slaves. The ninth clause of the act merely declares that no estate or interest in slaves shall be valid at law unless certain forms are complied with. In acts of parliament there is a clear distinction between law and equity. In the ship registry acts the words law and equity are used. In the present case the word law only is used, so that equitable interests in the slaves are not prevented being raised.

With respect to the recognition of the agreement by the respondents on their petition to the Court of Review: a mere description of the supposed security is no recognition of its validity; and the prayer is so framed. It is merely stated to give effect to the deposit, and not as the basis of the claim. The judgment of the Court of Review was right. It treats the agreement solely as it is evidence of the deposit. Whatever be the effect of the agreement, the deposit cannot be affected. It is true that the slaves named in the schedule of the deed deposited could not be the same as at the time of the deposit being made; but the order of the Court below gives the petitioners only the slaves mentioned in the schedule. If the registration required by the act be to be made every three years, a deed four years old would be invalid, and the policy of the act does not therefore require it.

Mr. *Wigram*, in reply, was stopped by the Court.

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.



1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.

Lord Commissioner *Shadwell*: — We are of opinion the judgment of the Court below, with respect to the slaves, cannot be sustained. The transaction between the parties was, a deposit of deeds accompanied by a written memorandum. It is not in our power to strike the memorandum out of the transaction, and treat it as if it were *ab origine* a deposit of deeds only. The memorandum and deposit must be taken together, to ascertain whether the memorandum be within the terms of the statute. The respondents contend that the memorandum does not in itself contain any words of agreement; but it appears to us that it has upon its face a declaration that the deeds shall be held in the nature of a deposit. The words are: "We hereby deposit and pledge with you the conveyance to us for valuable consideration of the plantation called Yeaman's, in the island of Antigua, together with the slaves thereon." This is clearly a declaration of the deposit of the conveyance, and is a written manifestation of the intent of the parties; namely, that the conveyance, the deed itself, should be held by the party who advanced the money as a pledge and deposit, that is, as security for the money.

It appears to us that the language of the 9th section of the 59th Geo. 3, c. 120, is grammatically correct, and perfectly clear and unambiguous. It does not, as the act of 1786 did, or intended to do, with respect to transfer of ships, speak of the transfer as existing, and at the same time declare it does not exist, which are the terms in which the language is couched. The words of the act are, "that when and so often as the property in any ship or vessel belonging to any of his Majesty's subjects shall be transferred to any other or others of his Majesty's subjects in whole or in part, the certificate of the registry of such ship or vessel shall be truly and



accurately recited in words at length in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void." Now if the bill of sale is utterly null and void, there is no transfer; and that act, therefore, of the 26th Geo. 3, whatever might be thought of the policy of it, certainly has not used the most accurate language. It is obvious that this was felt by the legislature when the 34th Geo. 3. was passed; for that act contains the following recital: "Whereas doubts have arisen whether by the said provision every transfer of property in any ship or vessel is required to be made by some bill or other instrument in writing, and whether contracts or agreements for the transfer of such property may not be made without any instrument in writing; be it enacted, that no transfer, contract or agreement for transfer of property in any ship or vessel made or intended to be made after the 1st day of January 1795 shall be valid or effectual for any purposes whatsoever, either in law or in equity, unless such transfer or contract or agreement for transfer of property in such ship or vessel, shall be made by bill of sale or instrument in writing containing such recital as prescribed by the said recited act." I have not the slightest doubt that when the 59th Geo. 3. was passed some attention was paid to the language which had been used in those former acts, or in other former acts of a similar nature; and that being the case, it is positively declared "that no deed or instrument made or executed within the kingdom, whereby any slaves shall be *intended* to be mortgaged, sold, charged, or any estate or interest therein created or raised, shall be good or valid unless the slaves are enumerated." In this case there was a deposit of an agreement intended to create an interest or estate in slaves; and yet, though it had manifestly that intention, the names of the

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.



1835.

*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.

slaves are omitted, nor is any schedule annexed. This case is therefore precisely within the plain language of the act, and consequently no interest in the slaves can be held to have passed to the intended mortgagees, and to that extent the order of the Court below must be discharged.

Lord Commissioner *Bosanquet* : — I am of the same opinion. The first point made is, that the parties, in fact, claim under the deposit, and not under the memorandum; but when the terms of any transaction or contract are reduced into writing, the writing itself becomes the instrument of contract. The terms upon which this deposit was made are expressly stated in the memorandum, and, not only so, but the very language of the memorandum expressly states the deposit to be made by virtue of that memorandum itself, and the modes by which the transaction accompanying the deposit is to be carried into effect. It is therefore clear that this equitable mortgage was created by virtue of the memorandum, and not by the mere act of deposit. A mere act of deposit raises an equitable mortgage by implication, but when the terms of that equitable mortgage are reduced into writing, the memorandum alone can be looked at as regards the terms of the contract.

The other question is, whether this is or is not within the meaning of the act of parliament? The act uses terms distinctly pointing to this sort of case. It is not confined to deed alone, but declares "that no deed or instrument made," &c. Is not this a memorandum or instrument by which it was intended to raise, and by which, in fact, an interest was raised in the slaves if they are equitably mortgaged. There can be no doubt upon the question; but then it is contended that the



expression in the act, "shall not be good or valid in law," does not affect equitable interests. I apprehend the meaning of this to be, that it shall not have the effect of charging or affecting any such slaves, unless the names be enumerated and set forth; the names in this case are not enumerated and set forth, either in the memorandum or in any schedule annexed to it. The deed which was deposited is dated four years before the memorandum, and professes to convey, not only the slaves mentioned in the schedule, but also the offspring, issue, and increase of those slaves; and the act of parliament, in the latter part of the eighth section, provides that where slaves have been conveyed by any deed, and there is an enumeration of them in the schedule, and those slaves are duly registered, then the offspring of those slaves, provided they are duly registered at the next registration, shall pass under that deed. Assuming, then, that there was a subsequent registration, and that the offspring of those slaves were duly registered, there would then be another description of persons brought into existence, whose names ought to have been mentioned in any subsequent conveyance. It is certainly to be remarked, with respect to the observations that have been made, that this executory contract conveys no interest at all. It is very remarkable that it is treated in this very transaction, by the order of the Court of Review, as a right or interest only; and is so treated by the petitioners, who pray that this right or interest may be sold under the commission: therefore they treat it not only as something to be carried into effect hereafter, and when it is carried into effect, that those who shall take under the conveyance shall be entitled to sell; they pray by virtue of their equitable mortgage that the sale of the right or interest may be

1835.

—  
*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.



1835.

*Ex parte*  
BORRODAILE.  
In the matter  
of  
RUCKER.

made. I am of opinion this case is within the act of parliament, and consequently, so far as regards the slaves, the order of the Court of Review is wrong.

Declare that the respondents take no interest in the slaves under the memorandum, and the order of the Court below, so far as it directed the sale of the slaves, reversed. No costs of the appeal on either side.

LORDS  
COMMISSIONERS.  
July 28,  
1835.

*Ex parte* KING and others. — In the matter of BENJAMIN SEVERN, FREDERICK BENJAMIN KING, and JOHN SEVERN.

By the terms of a devise, the interest of a sum was payable to a bankrupt for life, remainder to his children: the trustees (of which the bankrupt was one) were authorized to lend the principal to the bankrupt firm, which they did. On bankruptcy, and proof against the firm, held the dividend on the proof should be invested in stock, the interest of which was to accumulate, in the first instance, till the principal sum was made good again.

THIS was a petition by the infant children of the bankrupt *Frederick Benjamin King* from orders of the Vice-Chancellor, obtained *ex parte* and without service on the petitioners.

The facts were as follow:—

*Philip King* (the late grandfather of the petitioners) was a partner with *Benjamin Severn* as tea-dealer. *P. King* made his will in July 1801, and thereby, after giving certain legacies and annuities, bequeathed the residue of his property unto his executors, their executors and administrators, upon trust, to permit his nephew *F. B. King* (one of his executors) and his assigns to receive the dividends and annual produce thereof during his life, and from and after the decease of *F. B. King*, in trust to pay, assign, or transfer the principal monies from or out of which the interest, dividends, and annual produce should become due and payable, and the stocks, funds, or securities in or upon



which the same should be invested, to the only child, if but one, or to all the children if more than one, of *F. B. King*, equally to be divided between them, share and share alike; the same or the respective shares thereof to be paid to such child or children when and as he, she, or they should attain twenty-one years, and such shares respectively to be transmissible and to go to the lawful issue of such child or children, if they should die before such age; and the interest thereof, or so much and such part of the same as his executors should in their discretion think proper, to be applied in the meantime towards the maintenance and education of the children or issue of *F. B. King*; and the testator gave such directions as are in his will contained in case of the decease of *F. B. King* without lawful issue.

And he declared and directed that the capital from whence the annuities therein-before given should be paid, should remain in the trade in which he was concerned as a partner with *B. Severn* until the expiration or other sooner determination of the same; and then, if his nephew *F. B. King* should become a partner in the house with the share which the testator then had therein, with the approbation of *E. Kemble* (one of his executors) and his wife *E. King*, he directed that his whole capital in the partnership should continue therein, his nephew and partners who should continue the trade giving to his executors their joint bond for the same; a power being reserved by the bond or otherwise for *E. Kemble* to inspect the books of the house after the partners should have taken their stock; and if *E. Kemble* should think it not prudent to continue the capital therein, then he thereby directed his said executors, &c. to take the capital out of the partnership, and to purchase out of the same such quantity of stock as

1835.

—  
*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.



1835.

*Ex parte*  
**KING**  
 and others.  
 In the matter  
 of  
**SEVERN**  
 and others.

would be necessary to secure the payment of the annuity by his will given to his wife and the several other annuitants.

And the testator appointed his wife *E. King*, *E. Kemble*, his nephew *F. B. King*, and the Rev. *W. Booty*, executrix and executors; and afterwards, by a codicil dated the 10th January 1803, appointed *B. Severn* an additional executor.

The testator died in March 1803, and his will and codicils were duly proved the 21st of March 1803.

*F. B. King* was admitted a partner for a term of years, which expired in 1816.

*B. Severn* and *F. B. King* gave their joint and several bond for 74,943*l.*, dated the 16th of January 1804, to *E. King*, *E. Kemble*, and *W. Booty*, therein described as three of the executors of *P. King*. This bond recited the will of *P. King* and his death, and that *F. B. King* was admitted a partner, and that *E. King*, *E. Kemble*, and *W. Booty* had consented to permit the capital belonging to *P. King* in the trade to remain therein, on having the joint bond of *B. Severn* and *H. B. King*; and that the books of account of the trade had been made up, posted, and settled to the 19th of November 1803, whereby it appeared that the capital of *P. King*, after deducting the funeral and testamentary expences, legacies, and other outgoings, amounted to 37,471*l.* The bond was conditioned to be void upon payment by *B. Severn* and *F. B. King*, or either of them, their or either of their heirs, executors, or administrators, unto *E. King*, *E. Kemble*, and *W. Booty*, or either of them, their or either of their executors or administrators, of 37,471*l.*, on the 19th of May 1809, and interest in the meantime upon such trusts, &c. as are mentioned in the will of *P. King*.

A further sum of 366*l.*, part of the estate of *P. King*,



was also left in the hands of *F. B. King* and *B. Severn*, and employed by them in the business; and the 37,471*l.* and the 366*l.* were carried to the credit of the executors of the testator in an account opened by *B. Severn* and *F. B. King* in the books of their business, and entitled "The executors of *Philip King* esquire." In 1813 the bankrupt (*John Severn*) and *Thomas Bishop* were admitted into partnership with *B. Severn* and *F. B. King*, and the 37,471*l.* and the 366*l.*, (making together 37,837*l.*,) were transferred to and became part of the partnership assets of *Severn, King, Severn*, and *Bishop*; *Bishop* died in 1828, leaving *B. Severn*, *F. B. King*, and *John Severn* surviving, who continued in partnership: the 37,837*l.* was transferred to and became part of the partnership assets of *Severn, King*, and *Severn*, by whom that debt was adopted.

The petition here stated that *E. Kemble* and *E. King* were dead, leaving *W. Booty* surviving; *F. B. King* was still living; and that the petitioners, together with *E. Mills* deceased, the late wife of *T. Mills*, formerly *Elizabeth King*, and *Emma King*, *Julia King*, *Frederica King*, and *Ellen King* were the only children of *F. B. King*; *Elizabeth Mills* had attained twenty-one, and *Emma King*, *Julia King*, *Frederica King*, and *Ellen King* had all attained twenty-one, and the petitioners were respectively infants under twenty-one; and *Elizabeth Mills* died in 1829.

On the 7th of October 1829 a commission issued against *Severn, King*, and *Severn*. *Emma King* in August 1830 presented a petition stating the above facts, and also that *W. Booty* had not of late acted in execution of the trusts of the will of the testator, and praying that *W. Booty* and *F. B. King* might prove the debt against the joint estate of the bankrupts, which on the 12th August 1830 was ordered; and that out of any

1835.

—  
*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others



1835.

—  
*Ex parte*  
 KING  
 and others.  
 In the matter  
 of  
 SEVERN  
 and others.

dividend the costs of all parties should be paid, and that the residue should be paid by the assignees into the bank, subject to further order. *W. Booty* and *F. B. King* accordingly proved against the joint estate. The surviving assignees on 15th December 1830 presented a petition stating the above order, and proof, and that a dividend of 6s. in the pound had been declared, which on 37,837*l.* amounted to 11,351*l.*; that after payment of the costs, which amounted to 154*l.*, the residue, amounting to 11,197*l.*, was paid into the bank; and the petition prayed that the 11,197*l.* might be invested in reduced 3*l.* per cents., to be placed to the credit of this matter, that the accountant general might pay the dividends on the reduced 3*l.* per cents. to the assignees.

In December 1830 the Vice-Chancellor ordered, that the residue of the sum, after payment of the costs, should be laid out in the purchase of bank 3*l.* per cents. in the name of the accountant general, and that the annual dividends thereof should be paid to the assignees.

The residue of the 11,197*l.*, after payment of costs, was laid out in the purchase of 13,744*l.* bank 3*l.* per cents. The petition was not served on any of the present petitioners, nor upon any of the children of *F. B. King*, and none of the petitioners or other children had notice thereof. The assignees caused the dividends payable during the life of *F. B. King* on the 13,744*l.* 3*l.* per cents. to be sold by public auction, and *J. Farquhar* purchased them for 3,760*l.*, and afterwards assigned them to *T. N. Farquhar*; who on the 12th of July 1831 petitioned that the accountant general might pay to him the dividends on the 13,744*l.* 3*l.* per cents., payable during the life of *F. B. King*, which the Vice-Chancellor ordered on the 9th of August 1831. The last petition was served on the assignees only,



who consented. The petition stated that the petitioners were advised that such part of the order of the 16th of December 1830 as directed the dividends to be paid to the assignees was erroneous, and that the whole of the order of the 9th of August 1831 was erroneous; and that the dividends on the bank annuities ought to have been, and ought thereafter to be, accumulated and laid out in the purchase of bank annuities until such a sum of bank annuities should be purchased as should be equal to 37,837*l.* proved against the bankrupts; and that when such bank annuities should have been purchased, and not before, the assignees would be entitled to receive the dividends due thereon during the life of *F. B. King*; and that the petitioners would be entitled to the bank annuities, subject to the life interest of *F. B. King* therein, according to the trusts of the will of *P. King*. The petition prayed that so much of the order of the 16th December 1830 as directed the dividends on the bank annuities to be paid to the assignees, and also the order of the 9th of August 1831, might be respectively discharged, and that it might be referred to a master to take an account of what has been received by the assignees and by *T. N. Farquhar* in respect of the dividends on the 13,744*l.*, and of what had been received by the assignees in respect of the dividends on the 366*l.*; and that the assignees and *T. N. Farquhar* might be respectively directed to pay into the bank what should be found to have been received by them respectively; and that the monies when paid in might be laid out in the purchase of 3*l.* per cent. reduced bank annuities; and that the dividends then due or thereafter to accrue due on the several sums of 13,744*l.* and 366*l.* like annuities, and also the dividends to accrue due on the bank annuities to be purchased as aforesaid, might from time to time be invested in the purchase of

1835.

—  
*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.



1835.

—  
*Ex parte*  
 KING  
 and others.  
 In the matter  
 of  
 SEVERN  
 and others.

like annuities; and that such investment of dividends might be continued by way of accumulation until the bank annuities already purchased or to be purchased should together amount to a sum equal to the 37,837*l.*; or, if the Court should be of opinion that the purchase of the dividends on the 13,744*l.* by *T. N. Farquhar* ought to be confirmed, then that the assignees might pay out of the joint estate of the bankrupts what should be found to have been received by the assignees, and also the amount of the dividends thereafter to be received by *T. N. Farquhar* into the bank, or else to repay out of the joint estate the purchase monies paid by *T. N. Farquhar*, and interest, *T. N. Farquhar* in that case accounting for and paying the dividends already received by him; and that in any case the monies to be paid into the bank might be invested and accumulated in manner therein-before prayed; and that when the bank annuities should have accumulated to such amount as therein before mentioned, then that the petitioners and all other parties interested under the will might be at liberty to apply to that Court or to the Court of Bankruptcy or Court of Review.

Mr. *Jacob* and Mr. *Wood* for the appellants: —

The orders appealed from were obtained *ex parte*, the appellants not being served. The sole question is, whether the life interest of the bankrupt *F. B. King* in the dividends of the trust fund is or is not to be applied in the first instance to make good the deficiency in the trust fund, which occurred from default of the bankrupt as trustee.

The assignees stand in the place of the bankrupt, and take his interest subject to the equities attaching upon it. The life interest of the bankrupt cannot be made available for the creditors under the commission until the



deficiency in the trust fund occasioned by the bankrupt's default as trustee has been made good; *ex parte Maister* (a); *ex parte Turpin*. (b) In principle a commission is nothing but a statutory execution (c), and this Court would interfere against an execution creditor until the trust fund were made good.

The proof is against the joint estate of the three; the life interest of the bankrupt *F. B. King* in the dividends is his separate property. It was said in *ex parte Turpin* (b) that the children got a better dividend than the other creditors, the principal being proved and the dividends on the sum proved being also applied for them. That argument is not in this case applicable. It is the same here as a party having a joint and separate security, there being a joint debt, and a lien on the

1835.

*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.

(a) *Ex parte Maister*, in note to *ex parte Turpin*, *Mont.* 452.

(b) *Ex parte Turpin*, *Mont.* 443.

(c) This doctrine of statutory execution is contained in various cases.

It has been insisted that the commission has the same effect as a decree. This is not so. It is only a conveyance for the security of creditors. D. Lord Chancellor, *ex parte Knott*, 11 *Ves.* 619.—A commission of bankruptcy may be considered as an action and execution in the first instance. D. Lord Chancellor, *Dutton v. Morrison*, 17 *Ves.* 201.—The commission is in the nature of an execution for a legal debt. D. Lord *Elton*, *ex parte De*

*Tastet*, 1 *Rose*, 11.—A commission is not improperly called a statutory execution. Per *Mansfield*, C. J., *Sarratt v. Austin*, 4 *Taunt.* 208.—A commission of bankruptcy is said to be not accurately but in some degree an action and execution in the first instance. D. Lord Chancellor, *ex parte Hamper*, 17 *Ves.* 408.—The Court is in the habit of considering a commission of bankruptcy as, what it is frequently called, a species of execution in the first instance, and over that species of execution this Court has conceived itself to have the same discretionary power as other Courts have, by interposing to prevent an unlawful use of the law. D. Lord Chancellor, *ex*



1835.

—  
*Ex parte*  
 KING  
 and others.  
 In the matter  
 of  
 SEVERN  
 and others.

separate life interest of the bankrupt; and both securities may be had recourse to; *ex parte Peacock* (a), which case has been again and again recognized.

The appellants are entitled to have the future dividends applied to make good the capital, and to have an account taken thereof, and also of the purchase money received from *Farquhar*.

Mr. *Wigram* and Mr. *G. Richards* for the respondents:—

The orders of the Vice-Chancellor are correct. The respondents do not dispute, that, upon a breach of trust, the equity insisted upon would attach; but in this case there was no breach of trust, as by the terms of the will the money was allowed to remain and be employed in the partnership trade. The parties in remainder can have no benefit until the death of the

*parte Freeman*, 1 *Ves. & Beames*, 41.—In *Lee v. Lopez*, 15 *East*, 230, upon an application by *Horne* for a new trial, on the ground that the sheriff was bound to retain a year's rent as a commission was a statutable execution, Lord *Ellenborough* said, "A commission of bankruptcy has been sometimes called a statutable execution; but though it might be said to be similitudinary to an execution, it is not an execution;" and during the argument for the new trial Lord *Ellenborough* said, "The commission operates as an execution, but strictly speaking execution is only on a judgment." The case

determined in 1 *Atk.* (*ex parte Plummer*, 1 *Atk.* 103,) shows it not to be an execution, inasmuch as it will not prevent the landlord from distraining.—Under all the difficulty of considering a commission of bankruptcy as an execution in a strict sense. D. Lord Chancellor. *Ex parte Brown*, 1 *Ves. & Bea.* 66.—The expression *quasi* execution means no more than this, that a commission of bankruptcy is a process for all creditors legal and equitable. *Ex parte Storks*, 3 *Ves. & Bea.* 107.

(a) *Ex parte Peacock*, 2 *Gl. & J.* 27.



tenant for life; they are reversioners, and are entitled to the reversion only.

*Ex parte Shute* (a) is almost a precisely similar case; there a trader covenanted with trustees to pay them 1,200*l.* to be placed out at interest, to be paid to the trader for life, then to his wife for life, and then to the children; and in consideration the trader received 150*l.* as his wife's portion. He became bankrupt without having paid the 1,200*l.*, and it was held the 1,200*l.* was proveable, and the dividends applicable, first, to raise the wife's portion of 150*l.*, and then the interest on any further dividend to be paid to the assignees during the life of the bankrupt, and afterwards according to the trusts of the settlement.

In *ex parte Groome* (b) Lord *Thurlow* decided that where a husband covenants to leave his wife 600*l.*, if she survived, and becomes bankrupt, and dies, before any dividend is declared, yet that no proof could be admitted on behalf of the wife.

The case of *ex parte Turpin* (c) cannot be supported: that case over-ruled Lord *Thurlow*'s judgment in *Stratton v. Hale* (d); and in *ex parte Shute* (a) the Court of Review over-ruled its own decision in *ex parte Turpin*. (c)

The trustees have proved and received dividends, and *prima facie*, proof is payment (e), and the receipt of the dividends is payment in full. The law declares that

1885.

*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.

(a) *Ex parte Shute*, *Mont. & Bli.* 385.

(b) *Ex parte Groome*, 1 *Atk.* 114.

(c) *Ex parte Turpin*, *Mont.* 443.

(d) *Stratton v. Hale*, 2 *Bro. Ch. Ca.*, 489.

(e) See, as to the doctrine of proof being payment, *ex parte Watson*, *Buck*, 449; *ex parte Smith*, *Buck*, 492; *ex parte Hunter*, *Buck*, 555; and see note 4 Q. in *Mont. Annual Dig.*, where there is a long note on the subject.



1835.

—  
*Ex parte*  
 KING  
 and others.  
 In the matter  
 of  
 SEVERN  
 and others.

a bankrupt who conforms to the bankrupt laws is released from his debts; yet the trustees, to succeed here, must insist that the bankrupt still owes them a debt, or they could not claim his life interest in the dividends, which constitutes his separate estate. [Lord Commissioner *Shadwell*:—The question is, whether after proof against the bankrupt and other persons such proof is payment.] The policy of the bankrupt laws has been to apply the bankrupt's estate so as to distribute it most equally amongst all the creditors, not denying to a creditor taking a security on property, his right to retain the property and make his security available: the rule of distribution being *pari passu*: the joint creditors have the joint, the separate creditors the separate estate. The debt, it is contended, is gone by the proof; but assuming that a debt to the trustees exists, what is that debt? It is a debt of the *principal* sum due from the joint estate; but the *interest* derived from that principal is the separate estate of the bankrupt, and does not belong to the trustees. Now the bond being joint and several, the trustees therefore had a joint and several security, and might have elected to prove either against the joint estate or against the separate estate, but they could not prove and receive dividends under both estates. Here the parties contend that they have a right to receive dividends under the joint estate, and to have an integral part of the separate estate. They cannot do this. *Booty* elected to go against the joint estate of the three upon a demand distinct from the bond, and it is so stated in the petition. The debt could not be proved against the joint estate of the three, unless the debt from the two (which included the separate liability of each) were extinguished. It is clear law that the new firm would not be debtors to the old firm by the mere



transfer of the property. How then did *Booty* become entitled to prove against the three?

The trustees are at the bankruptcy creditors on the estate of the three only; and assuming that they have elected to go against the joint estate, how do they stand? When a new firm is formed, it is by constructive agreement that the new firm takes to the debts of the old firm; but this adoption, though good as between the partners themselves, is not binding upon third parties; *ex parte Wheeler* (a); *ex parte Williams* (b); and the old partners remain debtors. The adoption as between the partners themselves is nothing, unless acceded to by the creditors of the old firm, agreeing to adopt the new firm as their debtors. This right can only be given by contract; no special agreement is suggested in this case; the answer here is, that the debt was adopted by the new firm by transfer from the old. Putting aside any special contract, where is the consideration for the agreement to adopt the debt? The consideration for substituting the liability of the new firm must be made out. These petitioners cannot, in the absence of a special contract, claim a concurrent right against the new estate.

Mr. *Jacob* in reply: — First, with respect to the cases cited. The authority of *Stratton v. Hale* (c) has never been followed, and no decree was ever passed or entered, the only trace of the supposed order being a note in the registrar's minute book; and it appears from a note by Sir S. *Romilly* that Lord *Thurlow* was at first of a different opinion from that which is reported as his final

1835.

—  
*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.

(a) *Ex parte Wheeler*, *Buck*, 25.

(b) *Ex parte Williams*.

(c) *Stratton v. Hale*, 2 *Bro. C. C.* 490.



1835.

*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.

judgment. Besides, at the time when *Stratton v. Hale* (a) was decided, it had not been then settled that assignees took the property, subject to the same equities as the bankrupt. *Ex parte Groome* (b) Lord Thurlow considered as a case where there were cross demands; *ex parte Turpin* (c) is a case of great authority, and decisive of the present question, and is recognised in *ex parte Shute* (d); which latter case, so far as the 150*l.*, proceeds upon the same principle. The judges in *ex parte Shute* (d) considered the settlement fraudulent so far as it contained the clause as to bankruptcy. *Ex parte Maister* (e) was argued, as appears by the registrar's book, but not upon this point; the sum in question was 25,000*l.*, the assignees were cognizant of their rights; but the point was, whether the trustees were entitled to prove at all; one of the counsel suggested, that if the proof were admitted, a question might arise as to who would have the dividends; and the assignees then petitioned that they might retain the dividend until the fund was made up. What was done in that case tallies with *ex parte Turpin* (c). As to the argument that proof is payment, it is so to the extent of the dividends received only; if the debt were satisfied by the proof, all other securities would be useless, but otherwise the parties may avail themselves of their securities. *Ex parte Peacock* (f) has decided that creditors may prove against the joint estate, and retain their separate security. Here the

(a) *Stratton v. Hale*, 2 Bro. C. C. 490.

(b) *Ex parte Groome*, 1 Atk. 114.

(c) *Ex parte Turpin*, Mont. 443.

(d) *Ex parte Shute*, Mont. & Bl. 385.

(e) *Ex parte Maister*, in note Mont. 452.

(f) *Ex parte Peacock*, 2 Gl. & J. 27.



trustees proved against the three partners ; and the life interest of the bankrupt *F. B. King* is the separate security on which the trustees have an equitable lien or right of retainer, to be made available notwithstanding the proof against the joint estate. The right of proof against the joint estate cannot affect the right to retain separate securities. The money here was not at the bankruptcy in a proper state of investment, according to the trusts of the will. The bond ought to have been taken from the three, but was only from the two ; a breach of trust was therefore committed, and a joint and several debt created. The parties might have proved against the separate estate, but having elected to prove against the joint estate, their right of proof against the separate estate is gone ; but their lien on their separate security is not thereby affected. The petitioners here will not, so far as the proof is concerned, get more than a rateable dividend. The question is not between the petitioners and the joint estate, but between them and the separate creditors, who are not interested in the joint estate. It is the same as if these were separate commissions.

*Cur. ad. vult.*

The following judgment was subsequently delivered.

Lord Commissioner *Shadwell* :—The prayer of this petition was opposed in effect on three grounds.—1st. It was said that the debt could not be proved against the joint estate of the three bankrupts unless the debt from the two were extinguished. Supposing that to be the case, yet it does not appear how it can affect the equity of the children of the bankrupt *Frederick Benjamin King* ; which, if it arise at all, arises from the fact of his being a debtor, but whether jointly with one or

1835.

—  
*Ex parte*  
*KING*  
and others.  
In the matter  
of  
*SEVERN*  
and others.



1835.

*Ex parte*  
 KING  
 and others.  
 In the matter  
 of  
 SEVERN  
 and others.

two others is immaterial; and it is to be observed, that on the present petition no objection can be made to the proof. 2d. It was said that the debt had been paid by proof, and a dividend. The answer to which is, that proof and payment of a dividend, unless it be of 20s. in the pound, is not a satisfaction of the debt so as to disable the party proving from resorting to other securities which he may have; and the right to retain the dividends, if there be such a right, is merely a security; and lastly, it is said that the accountant general who received the dividends on the funds standing in his name, and represents the trustees, has only a portion of the separate estate in his hands, which belongs to the separate creditors. The case of *Stratton v. Hale* (a) was cited, as also were the other cases noticed by the Chief Judge of the Court of Review in his judgment in *ex parte Turpin*. (b) Of those cases it is not necessary to say any thing beyond what he has said, except that it has been stated from Sir Samuel Romilly's note that Lord Thurlow's first opinion in *Stratton v. Hale* (a) was different from what he finally pronounced, and that the decree is found only in the registrar's minute book, but never was passed or entered: why it never was perfected does not distinctly appear; but it is reasonable to suppose that Lord Eldon held what took place in that case (a) to be of no authority, because the point was expressly raised before him in 1816 in *ex parte Maister re Ramsay*, a short note of which case is in 1 *Mont.* page 452; and having seen the cases laid before Sir A. Piggott and Mr. Cooke, and their briefs in that matter, and the books of the secretary of bank-

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(a) *Stratton v. Hale*, 2 *Bro. C. C.* 148.

(b) *Ex parte Turpin*, *Mont.* 443.



rupts, I am satisfied that the attention of Lord *Eldon* must have been called to the point, and that he did deliberately decide against the ultimate opinion of Lord *Thurlow*. The same point was expressly decided by the Court of Review in *ex parte Turpin*. (a) I have also read over the printed but hitherto unpublished report of the case of *Smith v. Smith*; and it certainly seems that the decision of Lord *Abinger* was the same way; and Messrs. *Montagu* and *Ayrton* having supplied me with their manuscript report of the case of *ex parte Young* (b), I have perused it, and find that the same point was decided by a majority of the judges of the Court of Review on the 5th of May last. The principle of these decisions is, that the assignees represent the bankrupt, and take his separate estate subject to the equities that affect it, one of which is, that before he receives the dividends on the trust fund he shall make good the loss occasioned by his bankruptcy. This is the principle laid down by Sir *William Grant* in *Mitford v. Mitford* (c); and I must add, that if my attention had been formerly called to the point which is now raised, I should, as a matter of course, have directed that the order should be made in the manner now prayed. We are both of opinion that the orders of the 16th of December 1830 and 9th of August 1831 must be discharged, subject to any arrangement with *Farquhar* that may be agreed upon.

1835.

—  
*Ex parte*  
KING  
and others.  
In the matter  
of  
SEVERN  
and others.

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(a) *Ex parte Turpin*, *Mont.* 443.

(b) *Ex parte Young*, *ante* page 228.

(c) *Mitford v. Mitford*, 9 *Ves.* 100.



LORD  
CHANCELLOR,  
LOR,

*August 4th,  
5th, & 9th,  
1834.*

The 127th section of 6 Geo. 4, c. 16, does not apply where the second commission was before the 6 Geo. 4.

The bankrupt was insolvent in 1818, and a commission issued in 1832, under which he obtained his certificate, previous to 6 Geo. 4, c. 16: Held, the interest in an agreement entered into by the bankrupt subsequently to the certificate did not pass to the assignees under the commission.

*Ex parte* HAWLEY. — In the matter of  
RICHARDS. (a)

IN 1818 the bankrupt was, under the will of *Thomas Edwards*, deceased, entitled to an estate for life in remainder, expectant on the decease of one *Powell Edwards* without issue (which event took place in 1825), in certain freehold, copyhold, and leasehold estates, and in certain funds directed to be accumulated by an order of Chancery made in a cause for carrying the trusts of the will into execution. In 1818 the bankrupt took the benefit of the Insolvent Debtors Act, and in his schedule of property inserted his life interest; and his real and personal estates were conveyed to the provisional assignee of the Insolvent Debtors Court in April 1818. In April 1822 the bankrupt entered into a treaty with *Thomas Hawley* for the loan of 15,000*l.*, and by indenture, dated the 16th of July 1822, conveyed this life estate to *Thomas Hawley*; and by another indenture, bearing even date, after reciting the first indenture, and that the bankrupt had agreed to accept 15,000*l.* in jewellery goods from the stock of *Thomas Hawley*, it is witnessed, that in consideration of such goods, &c. the bankrupt demised his life estate to *Thomas Hawley* for ninety-nine years, if he the bankrupt should so long live, upon trust to pay *Thomas Hawley* all monies expended by him for premiums of insurance and costs, and for the interest to accrue due for

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(a) This case was heard before Lord *Brougham*, and stood over for judgment, but his Lordship resigned the Great Seal without delivering any judgment in court; and the reporters have only lately discovered that a short note of his Lordship's judgment was subsequently sent to the office of the secretary of bankrupts.



15,000*l.*, and to permit the bankrupt to hold the premises until default thereof. In 1824 one *Starkey* was chosen assignee under the insolvency, and on the 14th of January 1824 the then provisional assignee of the Insolvent Debtors Court conveyed the bankrupt's real and personal estate to *Starkey*. On the 18th of November 1824 *Starkey* put up the bankrupt's life estate in remainder for sale by public auction, and one *Edwin Griffiths* purchased the same for 5,250*l.* *Edwin Griffiths* was a trustee for *Thomas Hawley*, and by indentures of lease and release, dated the 5th and 6th of May 1825, the bankrupt and *Starkey* conveyed the life estate to *Edwin Griffiths* in trust for *Thomas Hawley*.

A commission issued against the bankrupt in August 1822. In 1825 *Powell Edwards*, the tenant for life, being dead, the bankrupt by letters patent assumed the name of *Edwards*. In April 1825 the bankrupt obtained his certificate.

In March 1828 the following memorandum or agreement was entered into by the bankrupt and *Thomas Hawley*:—"Memorandum, That it hath been agreed this 13th of March 1828, between *T. Hawley* of the one part, and *T. W. Edwards* (formerly *T. W. Richards*) of the other part; first, that *T. Hawley* the vendor shall sell, and *T. W. Edwards* the purchaser shall purchase, for 12,000*l.*, all that and those the estates which were of *T. W. Edwards* by his then name of *T. W. Richards*, and which passed by the will of *Thomas Edwards* of the 24th of March 1794, and by him *T. W. Edwards* conveyed or assured by indenture, bearing date the 16th day of August 1818, and made between the purchaser by his then name of *T. W. Richards* of the one part, and *Joseph Teyes* of the other part; and by another indenture, bearing date the 14th day of January 1824, and made between *Henry Dance* of the one part, and *John Smedley Starkey* of the other

1834.

—  
*Ex parte*  
HAWLEY.  
In the matter  
of  
RICHARDS.



1834.

—  
*Ex parte*  
 HAWLEY.  
 In the matter  
 of  
 RICHARDS.

part; and by another indenture, dated the 6th day of May 1825, made between *Starkey* of the first part, the said purchaser, by his present name of *T. W. Edwards*, of the second part, and *Edwin Griffiths* of the third part, and situated in the several counties of Glamorgan, Monmouth, Brecon, Somerset, and Devon; *and also all those the dividends and interests in the sum of 20,999l.*, to be accumulated under an order of the Court of Chancery, and invested in the three per cent. consols; and all other the estate of *T. Hawley*, or of *Edwin Griffiths* as his trustee, of, in, to, or out of the estates, monies, and premises respectively, which were of *Thomas Edwards* deceased, and which passed under the several indentures of the 16th of April 1818, the 14th of January 1824, and the 6th of May 1825, or in any other manner howsoever."

*Thomas Hawley* died intestate on the 4th of September 1828, and *Maria Ann Hawley* became his administratrix. On the 8th of September 1832 a petition was presented to the Court of Review in the name of the administratrix, praying that the contract might be delivered up to be cancelled, &c.

The petition was heard on the 12th of November 1832. The bankrupt admitted the fact of his having taken the benefit of the Insolvent Act, and evidence was read to prove that the assets under the commission had not paid a dividend of 15s. in the pound; whereupon the counsel for the petitioner submitted that the bankrupt had no title to be heard further in opposition to the petition; and the assignees appeared and stated they had no assets wherewith to complete the contract, and claimed no interest therein, and consented that it should be given up to be cancelled.

The Court dismissed the petition, with costs, on the following grounds:—That the contract having been made with a certificated bankrupt who had obtained his



certificate prior to the passing of the 6 Geo. 4, c. 16, was not within the 127th section of that act, and consequently did not vest in the assignees, who could not therefore be ordered to deliver it up under section 76; and that the Court had no authority to compel the bankrupt to part with it.

1834.  
—  
*Ex parte*  
HAWLEY.  
In the matter  
of  
RICHARDS.

This was a special case stating the above facts at length, and concluding thus:—"The petitioner submits, upon the above statement of facts, that the Court of Review ought to have ordered the assignees to take possession of the contract under the commission, and to deliver it up to the petitioner to be cancelled, or at any rate to have made an order in conformity with the petition."

Mr. *Rolfe* and Mr. *Bagshaw* for the appellants:—

The 9th section of the 5 Geo. 2, c. 30, is as follows: "That from and after the 24th day of June 1732, in case any commission of bankruptcy shall issue against any person or persons, who after the said twenty-fourth day of June 1732 shall have been discharged by virtue of this act, or shall have compounded with his, her, or their creditors, or delivered to them his, her, or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors after the time aforesaid, that then and in either of those cases the body and bodies only of such person and persons compounding as aforesaid shall be free from arrest and imprisonment by virtue of this act; but the future estate and effects of every such person and persons shall remain liable to his, her, or their creditors as before the making of this act, (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt and his wife and children only excepted,) unless the estate of such per-



1834.

*Ex parte*  
HAWLEY.In the matter  
of  
RICHARDS.

son or persons against whom such commission shall be awarded shall produce, clear after all charges, sufficient to pay every creditor under the said commission fifteen shillings in the pound for their respective debts."

The 127th section of 6 Geo. 4, c. 16, enacts, "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission."

The words of the 5 Geo. 2. are "shall be or become;" the words of the 6 Geo. 4, which passed in 1825, are "shall have been;" if there be any difference between the wording of the two sections, it is quite clear that the intent was the same. It has been decided in several analogous cases, that different clauses of the 6th Geo. 4. are retrospective. In *Fowler v. Coster* (a) it was decided that a third commission was void, being issued since the 6 Geo. 4, c. 16, against a trader who had paid no dividend under a first and second commission issued before the 6 Geo. 4, c. 16. In that case Lord *Tenterden* says, speaking of the 127th section of

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(a) *Fowler v. Coster*, 10 Barn. & Cres. 427.



6 Geo. 4, c. 16,—“The last words differ from those of 5 Geo. 2, c. 30, sect. 9, which are, that the future effects shall remain liable to the creditors as before the passing of that act,—that is, liable to individual creditors; but this did not prevent them from vesting in the assignees under a third commission, according to *Hovil v. Browning* (a), and *Todd v. Maxfield* (b), whereas under the last act the property is expressly vested in the assignees; consequently the assignees under the second commission are entitled to all the effects of the bankrupt.” [LORD CHANCELLOR: — I think *Fowler v. Coster* was decided before the King’s Bench had the decision in *ex parte Welsh* (c) before them.] In *Robertson v. Score* (d) it was decided that a certificate under a second commission, where the bankrupt had not paid 15s. in the pound under the first, did protect his person though his future effects vested in the assignees under the second. Lord *Tenterden* in giving judgment says,—“The argument of the defendant proceeded on two grounds; first, that the last Bankrupt Act, section 127, does not apply to a case where the first certificate was granted under a commission issued before the passing of the act. We are inclined to think that it does apply to such cases; but it is not necessary to give an absolute opinion on that point, because, assuming that it does,” &c. In *Carew v. Edwards* (e) it was held that the 127th section was not retrospective, so as to enable the bankrupt to set up his certificate in bar to an action; but that case did not decide that section 127 was not retrospective: the decision was on the ground that under the 5 Geo. 2, c. 30,

1834.

*Ex parte*  
HAWLEY.

In the matter  
of  
RICHARDS.

(a) *Hovil v. Browning*, 7 East,  
154.

(b) *Todd v. Maxfield*, 3 Barn.  
& Cres. 222.

(c) *Ex parte Welsh*, Mont. 276.

(d) *Robertson v. Score*, 3 Barn.  
& Adol. 338.

(e) *Carew v. Edwards*, 4 Barn.  
& Adol. 351.



1834.

—  
*Ex parte*  
 HAWLEY.  
 In the matter  
 of  
 RICHARDS.

the creditors might sue the bankrupt,—that the 135th section of 6 Geo. 4, c. 16, enacted that the act should not “affect or lessen any right, claim, demand, or remedy which any person now has,” &c. “except as herein *specifically* enacted;” and that there were no words in 6 Geo. 4, c. 16, whereby the right of the creditor to sue the bankrupt under the circumstances were *specifically* taken away; and finally, *Elston v. Braddick* (a) decided that the section was retrospective, so as to vest the property in the assignees under the subsequent commission.

Mr. *Anderdon* for the assignees.

Mr. *Treslowe* and Mr. *Ching* for the bankrupt:—

The question is, whether the property was or was not vested in the assignees? Now the assignees at the hearing in the Court of Review repudiated all interest in the contract in question, whereupon it became vested in the bankrupt, who accordingly appeared and claimed an interest in the property; and section 127 of 6 Geo. 4, c. 16, does not extend to any cases but those where the former bankruptcy and certificate were before that act; *Robertson v. Score* (b); and following this doctrine, one of the judges of the Court of Review said, when this case was before that Court, that if the assignees reject property as a *damnosa hæreditas* (c), it vests in the bankrupt. (d)

Upon the renunciation or disclaimer of the assignees

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(a) *Elston v. Braddick*, 4 Tyrw. 7 East, 339; *Page v. Bauer*, 122. 4 Barn. & Ald. 345. An assignee

(b) *Robertson v. Score*, 3 Barn. & Adol. 338. under the Insolvent Act has not this election, *Crofts v. Peck*, 1

(c) That assignees may reject *Bing*. 354.

property, see *Bourdillon v. Dalton*, (d) *Copeland v. Stephens*, 1  
 1 Esp. 253; *Broome v. Robinson*, Barn. & Ald. 593. *Tuck v. Tyson*,  
 cited in *Turner v. Richardson*, 6 Bing. 330.



the interest in the contract remains vested in the bankrupt; the assignees take the bankrupt's property only for the payment of his debts, and are trustees for him of all they do not require for that purpose, and the bankrupt's title is good against all the world but the assignees: *Webb v. Fox* (a), *Drayton v. Dale*. (b)

1834.  
—  
*Ex parte*  
HAWLEY.  
In the matter  
of  
RICHARDS.

The 6 Geo. 4, c. 16, had not come into operation at the time the bankrupt obtained his certificate, except as to the clauses relating to certificates; and section 127, on which the title of assignees rests, does not relate to the certificate, but to the interest of the assignees in the bankrupt's future property. The 76th section of 6 Geo. 4, c. 16, gives the Court jurisdiction only to deal with the assignees; the Court is to order them, that is, the assignees, to elect to deliver up the agreement and possession of the premises, of course assuming that both are in their possession before they can be ordered to deliver them up; but here the agreement is in the hands of the bankrupt, and the interest under the agreement is also in him, and the Court has no jurisdiction over him. As to this matter, the petition indeed prays that the bankrupt may be ordered to deliver up the agreement to his assignees, that they may deliver it up to the vendor; but that which the Court cannot do *per directum*, it cannot do *per indirectum*.

In *Elston v. Braddick* (c) there was a commission in 1829 interposed between an insolvency in 1815 and a commission under the 6 Geo. 4, c. 16, in which that case differs from the present. *Fowler v. Coster* (d) proceeds

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(a) *Webb v. Fox*, 7 T. R. 391.

(b) *Drayton v. Dale*, 2 Barn. & Cres. 293.

(c) *Elston v. Braddick*, 4 Tyrw. 122.

(d) *Fowler v. Coster*, 10 Barn. & Cres. 427.



1834.

*Ex parte*  
HAWLEY.In the matter  
of

RICHARDS.

upon a doctrine which this Court does not recognize, viz., that the Lord Chancellor had no power, under the circumstances, to issue a third commission, and that if issued it was not merely nugatory but void.

*Robinson v. Score* (a) merely decided that the certificate was a bar to debts proveable. The dictum as to the clause now in discussion being retrospective was extrajudicial, and Lord *Tenterden* in giving judgment said it was not necessary to give an opinion on that point.

In *Carew v. Edwards* (b) all the preceding cases were brought under consideration, and the Court decided that the section 127 was not retrospective. The circumstances of that case closely resembled the present; there had been an insolvency, under which 15s. in the pound had not been paid, and a bankruptcy under which the bankrupt obtained his certificate before the 6 Geo. 4, c. 16; and it was held that the 127th section was not retrospective, and that the property subsequently obtained did not vest in the assignees.

Qu. Whether the 76th section of 6 Geo. 4, c. 16, applies to a contract relating to land, and *personalty*.

This is an application under the 76th section of 6 Geo. 4, c. 16, which enacts, "that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in *land*, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor or person claiming under him, or may make such other order therein as he shall think fit."

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(a) *Robinson v. Score*, 3 Barn. & Adol. 339.

(b) *Carew v. Edwards*, 4 Barn. & Cress. 351.



Now this section is confined to *land*; but this contract does not relate to land alone, and therefore the Court has no jurisdiction to order it to be delivered up. [LORD CHANCELLOR:—Have I jurisdiction? The 76th section of the act gives jurisdiction when the subject matter of the contract relates to land only; but this contract related also to personalty. Can I, then, order it to be delivered up?]

1834.

—  
*Ex parte*  
HAWLEY.

In the matter  
of  
RICHARDS.

Mr. *Rolfe* in reply:—The whole question is, whether section 127 be retrospective. In *Elston v. Braddick* I have the short-hand writer's notes of the judgment of Mr. Baron *Bayley* deciding that the clause is retrospective. (a)

Mr. *Treslowe* objected that the short-hand writer's notes of what a judge said could not be cited as an authority.

The LORD CHANCELLOR:—If a gentleman at the bar produces a manuscript note of a decision, and declares that he is certain of its being a correct note of the *point decided*, I should attend to it; but it is different when a long manuscript judgment is produced. A gentleman might be quite sure of the point decided, who could not safely vouch for the accuracy of a long judgment.

Authority of  
manuscript notes  
of cases.

Mr. *Rolfe*:—The precise words I now hold in my hand will be embodied in a report in a few months (a); and then I shall be able to cite it as authority when in print, though I cannot cite at all in manuscript.

LORD CHANCELLOR:—The reason of that difference is that the reporter, who is an impartial person, gives the authority of his name to the matter.

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(a) *Elston v. Braddick*, since reported in 4 *Tyrw.* 122.



1834.

—  
*Ex parte*  
 HAWLEY.  
 In the matter  
 of  
 RICHARDS.

Mr. Rolfe then embodied the judgment in his reply (a), and proceeded as follows:—The 6 Geo. 4, c. 16, sect. 127, is therefore retrospective. It has been

The 127th section of 6 Geo. 4, c. 16, is retrospective.

(a) In the Exchequer of Pleas, 21st February 1834, *Elston v. Braddick*.

Mr. Baron Bayley:—The facts of this case are very short. There was a discharge under the Insolvent Debtors Act in 1815; in 1825 the 6 Geo. 4, c. 16, passed, and in 1829 a commission issued, and this is a question whether or not the early part of the 127th section be retrospective. Previous to the passing of the 127th section of the 6 Geo. 4, the only enactment on the subject was the 5 Geo. 2, c. 30, s. 9, which enacted, &c.\* There was also a provision of a similar nature in the Insolvent Debtors Act in force when the 6 Geo. 4. passed; consequently in the present case, when the 6 Geo. 4. passed, the future effects were liable to the claim of every separate creditor, and to that of the assignees of the Insolvent Debtors Court. If the 127th section of 6 Geo. 4, c. 16, be retrospective, all right on the part of the assignees under the Insolvent Debtors Act is destroyed. Before immediately considering this question, it should be noticed that the 135th

section of the 6 Geo. 4, c. 11, enacts that that act is to be construed beneficially for creditors, and that one intent of the 127th section probably was to put persons in trade on their guard, so that if they had had a previous discharge they should be mulct from carrying on trade without such a capital as would be likely to pay 15s. in the pound in the event of bankruptcy. Now the language of the 5 Geo. 2. is pointed and guarded, with an industrious intention to prevent its being retrospective, while the legislature, having that act before it, omits in the 6 Geo. 4. any such terms of restriction. But then the 5 Geo. 2. was new in *omnibus*, and it might have been considered that it would be visiting a party too penally to make discharges which were previously innocent — comparatively innocent — with the punishment which that clause inflicted; but when the 6 Geo. 4. passed, the property was liable, if there had been a previous discharge or insolvency, unless 15s. in the pound had been paid; but then it was only liable if the creditors signed

\* See the clause, ante page 429.



argued that it would be unjust, if retrospective. Why so? Is there any thing unjust in distributing a bankrupt's property in payment of his debts? Till the 21st

1834.

—  
*Ex parte*  
HAWLEY.  
In the matter  
of  
RICHARDS.

it. Then came the 6 Geo. 4, c. 16, s. 127, and it appeared to me that the alteration made was principally with intent to prevent the race which would take place, and the expenditure of costs which would follow from each creditor suing separately, which was done by vesting the property in the assignees, and enabling them to sue for the benefit of all the creditors.

The part of the 127th clause in question commences thus, "that if any person who shall be so discharged by such certificate as aforesaid, or who shall have compounded, &c., or shall hereafter obtain such certificate as aforesaid, unless," &c. If the words as to certificates had been omitted, there certainly would have been nothing to prevent the section being retrospective; but it has been pressed on the Court in argument, that the words "if any person who shall have been discharged by such certificate as aforesaid, or," &c. by a necessary implication confine that portion of the clause to a prospective operation only with regard to compositions and discharges. Whether that would be a legitimate conclusion the Court possibly may doubt; but

if it were, and the words only applied to certificates granted since the 6 Geo. 4, c. 16, passed, I concede it would control the operation of the clause as to composition and discharges. Let us consider, therefore, whether these words are necessarily or naturally confining the section to a prospective operation.

The 127th section is preceded by other clauses concerning certificates; as section 121, which provides "that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as herein-after directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound, or had made any joint contract with such bankrupt." And then section 122



1834.

—  
*Ex parte*  
 HAWLEY.  
 In the matter  
 of  
 RICHARDS.

of June 1825, the 5 Geo. 2. was in operation. On that day the 6 Geo. 4. came into operation, from 2d May 1825, as to certificates. Supposing this to be a case in which

provides how future certificates are to be signed; consequently these two clauses apply to one species of certificates introduced *de novo* by the two clauses; whether they apply to certificates incomplete when the 6 G. 4, c. 16, passed may possibly admit of doubt, but on that point we are not called on to make any decision. But sections 121 & 122 are not the only provisions in the act to which the words "such certificate as aforesaid" may be referable, for section 123 relates to certificates signed before the 6 G. 4, c. 16, came into operation, which creates another species of certificate, to which the words "such certificate" have reference. The next clause as to certificates is the 126th; there does not appear to me to be anything in the language of this clause confining it to commissions under the 6 G. 4, c. 16; there might, and probably would be, many instances of suits against and arrests of a man who had obtained his certificate under the 5 G. 2, unless the 6 G. 4. gives him power to apply to be discharged, and plead the general issue, for the 5 G. 2. is repealed and gone. I am therefore of opinion that section 126 includes

as well discharges by certificates under the 5 G. 2. as the 6 G. 4; if so, the language of section 127 becomes obvious, and admits of no reasonable doubt, meaning any person who shall have been discharged by any certificate, either one under the 121st and 122d section of 6 G. 4, or 5 G. 2.

On the words, therefore, of the 5 G. 4, c. 11, s. 127, it appears to me, and I believe to the whole Court, to be plain, that the true construction is to make the 127th section apply to discharges as well under the 5 G. 2. as under the 6 G. 4; and there are two cases, in one of which it must have been so considered, and in the other the Court of King's Bench, though not necessarily required to express any opinion on section 127, yet do so, and that after taking time to consider; and whoever recollects the caution of Lord *Tenterden*, knows it was one of his peculiar characteristics to avoid giving a judicial opinion on any point not necessary to decide.

The two cases are, *Fowler v. Coster*, 10 *Barn. & Cres.* 427, and *Robinson v. Score*, 3 *Barn. & Adol.* 539.



the 76th section applies, yet the decision must be in favour of the appellant.

LORD CHANCELLOR: — The objection as to the subject matter in dispute not being land has not been quite removed from my mind; but I will consider of judgment.

1834.

*Ex parte*  
HAWLEY.  
In the matter  
of  
RICHARDS.

*Cur. ad. vult.*

This day the Lord Chancellor sent a note of his judgment to the office of his secretary of bankrupts, dismissing the appeal with costs. 9th August.

In *Fowler v. Coster* one commission issued in 1814, a second in May 1826, being after the 6 G. 4, and a third in 1829, and it was held that the third was void on the ground that the case came within the 127th section, which it could not do, unless that section applied to certificates under the 5 G. 2; it is impossible to support that case on any other ground.

In *Robinson v. Score* the Court said, that though it was not necessary to decide the point, yet their opinion was that the 127th section did apply to cases previous to the 6 G. 4.

We are therefore of opinion upon the language and spirit of the act, upon the contrast which exists between the wording of the 9th section of 5 G. 2. and the 127th section of 6 G. 4, upon a consideration of what the previous case had been, and upon the two cases of *Fowler v. Coster*

and *Robinson v. Score*, that the present case is within the 6 G. 4, and that you are at liberty to refer to by-gone discharges, whether by certificate, composition, or insolvency.

It was pressed by Mr. *Follett* in argument that this construction takes from the assignees of the Insolvent Debtors Act their chance as to future assets under the clause therein, which enacts that a judgment shall be given to them, under which they may seize future assets. No doubt such will be the case, but we think that interest too minute to stand in the way of the general provision, and that the totally depriving the creditors under the Insolvent Act of that competition which otherwise would exist does not militate against that construction which we are of opinion ought to be put on the 127th section of 6 G. 4, c. 16.



LORDS  
COMMIS-  
SIONERS,  
*August,*  
1835.

Q<sub>u</sub>. Whether  
a joint commis-  
sion against two,  
joint traders  
with a third not  
included in the  
commission, on  
a debt due from  
the two, is valid?

Neither sur-  
rendering, in-  
terfering in the  
choice of assign-  
ees, interposing  
as to the dispo-  
sition of the es-  
tate, passing the  
last examina-  
tion, nor endea-  
vouring to ob-  
tain the certifi-  
cate, are acts of  
acquiescence.

*Ex parte* CHAMBERS the elder.—In the matter of  
CHAMBERS the elder.

CHAMBERS, the father, carried on business with  
Chambers, the son, as bankers; they suspended pay-  
ment on the 3d of November 1824, when a deed of  
arrangement was executed, and a letter of licence was  
granted to Chambers the father and son for five years.

In November 1825 it was revoked, on the allegation  
that Chambers the father had not performed his part of  
the conditions of the deed. Chambers the elder dis-  
puted the validity of the revocation, and insisted that it  
was void.

Before the revocation, the trustees under the deed  
had got in monies of the estate of Chambers and Son to  
the amount of 30,000*l*.

On the 19th November 1825 a joint commission  
issued against Chambers the father and the son on the  
petition of William A'Beckett (who signed the deed of  
arrangement) on a debt due to him from Chambers and  
Son as bankers, in which commission they were de-  
scribed as bankers: but which trading was not sufficient  
to support the commission, as there had not been any  
trading to support the commission since the 6 Geo. 4,  
c. 16, came into operation. (a)

Seven trials at law took place in which the validity  
of the commission was disputed.

1st Trial. An action in the Exchequer by Wilton, an

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(a) *Maggs v. Hunt*, 12 Moore, 2 Man. & Ry. 586; *Palmer v.*  
357; *Surtees v. Ellison*, 9 Barn. Moore, 9 Barn. & Cres. 754, in  
& Cres. 750, S.C.; 2 Moo. & Ry. note; *ex parte Batten*, Mont. &  
586; *Hewson v. Heard*, 9 Barn. Mac. 287; *Worth v. Budd*,  
& Cres. 754, in note, S.C.; 2 Barn. & Adol. 908.



execution creditor, against the sheriff for a false return of *nulla bona*: the only trading given in evidence was that of bankers, and the jury found a special verdict, upon which judgment was given for the plaintiff. Execution issued, and the amount was paid.

1835.

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*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

**2d Trial.** An action in the King's Bench by the assignees against *Wilton* and the sheriffs of Middlesex for trespass on the 18th of December 1827, when the assignees relied, not on establishing proofs of the requisites, but on certain acts by which it was alleged *Chambers* the father and son were estopped from disputing the commission; and that these objections applied equally to the sheriff and *Wilton*, because *Wilton* was in collusion with them; and a verdict was given for the assignees on the ground of such estoppel and collusion. The verdict, however, was set aside, and a new trial granted, on the ground that such reasons were not sufficient.

**3d Trial.** *Bernasconi v. Fairbrother*, January 15, 1829: the new trial came on, when the assignees withdrew the record. In April 1829 the action was tried, and a verdict found for the assignees. The only trading to support the commission was a trading by Mr. *Chambers* and his son, with a person of the name of *White*, as dealers in a substance called Pozzalani clay; but the debt of *A'Becket*, the petitioning creditor, was not due from *Chambers* senior and *Chambers* junior and *White*, but only from *Chambers* senior and *Chambers* junior, as bankers. It was objected that this was not a sufficient debt to support the commission, as it could be supported against two of a firm of three only by section 16 of 6 Geo. 4, c. 16, which did not extend to this case, it being as follows:—"That any creditor or creditors, whose debt or debts is or are sufficient to entitle him or them to petition for a commission against



1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

all the partners of any firm, may petition for a commission against one or more partners of such firm;" which obviously does not authorize issuing a commission against two partners of a firm, except upon a debt due from the whole firm; but Lord *Tenterden* overruled the objection, and said, that if two or three persons be in partnership it is sufficient to prove the debt against the party against whom the commission is taken out, and the petitioning creditor is not bound to take it out against them all.

In the other four actions the questions turned chiefly upon the act of bankruptcy, and appear not to be of any importance to report, as they related to matters of fact.

The other facts of the case are fully stated in the arguments and judgment.

There were two petitions. The first presented in March 1831, for a supersedeas for want of an act of bankruptcy by either of the bankrupts. The second presented in September 1834, raising other points and praying a supersedeas for want of a petitioning creditor's debt and trading, and that being a joint commission against the two bankrupts without including their third partner, issued upon a joint debt of the two bankrupts, was an illegal, or at least an improper commission, and therefore ought to be superseded, and also for want of an act of bankruptcy by either of the bankrupts; and generally on the ground that after ten years litigation, it was established that there was not either a sufficient debt or act of bankruptcy to support the commission.

Sir *William Follett*, Mr. *Alexander*, Mr. *Temple*, Mr. *Montagu*, and Mr. *Bethell*, for the petition:—

The questions are: First, whether *Chambers* has so acquiesced as to be estopped from disputing the validity of the commission; second, if not estopped, then whether



there be a good petitioning creditor's debt,—a sufficient trading; and, third, whether there be any act of bankruptcy?

As to acquiescence. The case raised by the affidavits is that he acquiesced before the choice of assignees by surrendering, at the choice by interfering, and after the choice by interposing as to the disposition of the property, by passing his examination, by endeavouring to obtain his certificate, and by having received his allowance. These reasons when united may appear to have some weight: it is nothing but appearance, as will be perceived when they are examined separately.

As to surrendering. The first case on this subject is *Flower v. Herbert* (a), where Lord *Hardwicke* said: "It is true the acts of parliament being very perilous to bankrupts, it is reasonable for a man who may believe he is no bankrupt to go before the commissioners, submitting to them for the time, yet still protesting that he is no bankrupt; he may, notwithstanding, bring an action in proper time, though this is pretty strong after surrendering, submitting to be examined by the commissioners, and going through all that process; yet that I agree would not bind him, but he might bring an action." In the next case, *Mercer v. Wise* (b) Lord *Kenyon* said: "That being declared a bankrupt, whether rightfully or not, he was bound to surrender under the terrors of committing a felony, which he would have incurred had he not surrendered. That, as, therefore, his apparent acquiescence under the commission was from necessity, he should not hold the surrender an

1835.

*Ex parte*  
CHAMBERS.

In the matter  
of  
CHAMBERS.

Acquiescence.

Surrendering.

(a) *Flower v. Herbert*, 2 *Ves.* 326.

(b) *Mercer v. Wise*, 3 *Esp.* 19. The page is erroneously printed 219.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

acquiescence in the legality of the commission, but leave him at liberty to contest it." Then in *Like v. Howe* (a), and in *Heane v. Rogers* (b), it was admitted that the mere surrender was not an acquiescence or estoppel. Besides, when it is remembered that the bankrupt cannot petition to supersede till he has surrendered, *ex parte Clarke* (c); and that it is the duty of a supposed bankrupt to obey the law, it can no longer be contended that surrender is an estoppel.

Interfering in  
 choice of as-  
 signees.

The next alleged proof of acquiescence is interfering in the choice of assignees. It is not denied that this is often most improper, where the intent is to injure the creditors; but it is clear that cases exist where interference to prevent fraud is most laudable.

In *Like v. Howe* (a), Sir *James Mansfield* held at Nisi Prius, that any interference in the choice was an acquiescence; but the propriety of interference was fully considered in *ex parte Shaw* (d), where Lord *Eldon* said: "I have great difficulty in my own mind to determine what is the degree of interposition on the part of a bankrupt which would make a choice null and void. In the nature of some cases advice and solicitation may be very well characterized as not being undue; I am ready to agree that if you can make out that the choice has been effected by the improper interposition of the bankrupts, the assignees shall be denied the character of assignees. Is it quite clear that it is a wholesome principle which intends that the person who has the most accurate

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(a) *Like v. Howe*, 6 *Esp.* 20.

(b) *Heane v. Rogers*, 9 *Barn. & Cres.* 587.

(c) *Ex parte Clarke*, *Mont. & Bli.* 384, and note at the end of that volume.

(d) *Ex parte Shaw*, 1 *Gl. & J.* 127.



knowledge of the state of his affairs, how he became a bankrupt, by what means his fortune may be retrievable, and by what method his estate may be best collected for the benefit of his creditors (even without yielding him any surplus), must shut his mouth? or that he is to say,—‘I cannot advise any of you to choose the person who I think would be the best assignee?’—and yet the person he would recommend might be the only proper person to administer his affairs.” This doctrine is right; and the correctness of Lord *Eldon’s* view is supported by three cases, *Mackie’s case* (a),

1835.

*Ex parte*  
CHAMBERS.

In the matter  
of  
CHAMBERS.

(a) The following case occurred in 1807. *A. M.* having practised for many years as a surgeon and apothecary saved the sum of 6,000*l.* In March 1806 he saw an advertisement in one of the public papers to the following effect:—“Wanted a partner in a mercantile concern in the city who can advance about 1,500*l.*, where the attendance is easy and the profits considerable.” In consequence of this advertisement, and with the hope of improving his fortune for the benefit of his family of eight children, he entered into partnership with the advertiser. Two months after he had so entered into partnership, a commission of bankruptcy issued against them upon a bill accepted in the partnership name by the advertiser, without any consideration, and without the knowledge of *A. M.* The act of bankruptcy was a denial proved by a servant

of the advertisers. The holder of the bill, a friend of the advertisers, elected himself assignee, and possessed himself of all the property of *A. M.*, to the amount of 6,000*l.* No debt was attempted to be proved under the commission. *A. M.*, his wife, and eight children, three of whom were young women just entering into life, were soon reduced to the greatest distress. It was the long vacation, and the Lord Chancellor was in the country. In the sittings before Michaelmas Term 1807, a petition stating these facts was presented. The Lord Chancellor ordered the assignee forthwith to pay into Court the money which he had received under the commission. The order was disobeyed, and the assignee was committed to the Fleet, and remained there. Q. Was it not the duty of Mr. *Mackie* to endeavour to procure proper assignees?



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

*Dignum's* case (a), and this case of *ex parte Shaw*. (b)  
 In the present case the intention of *Chambers* was to prevent certain improper persons being chosen assignees, and the commissioners concurred with him, and rejected them.

The next proof of acquiescence is assisting in the realization of the property, which is subject to the same answer. In the early cases it was supposed to be acquiescence; but the contrary is clearly established, and finally settled in *Heane v. Rogers*. (c) Is it not the bankrupt's duty to assist in securing the realization of property for himself, if the commission be bad, for his creditors, if good? It is then alleged that his applying

(a) The following case occurred in May 1809. *W. D.*, an Irishman, after having lived for seventeen years in the service of a gentleman in Ireland, came to England, with the hope of bettering his fortune, with 400*l.* in money, and a respectable merchant's promissory note for 400*l.* more. This 800*l.* he had saved during his long service. Soon after his arrival in London, he met, at the inn where he lodged, a native of Ireland, who had long resided in England. *W. D.* explained his situation and prospects to his countryman, who, upon learning that he was in possession of 800*l.*, persuaded *W. D.* to engage with him in a partnership. Within two months after the partnership commenced, he obtained 400*l.* from *W. D.* During the third month after the partnership commenced he made repeated unsuccessful ap-

plications to *W. D.* for the promissory note for 400*l.* A commission of bankruptcy was immediately issued against *W. D.* At the meeting for the choice of assignees, a person attended to swear a debt, and to elect himself assignee for the purpose of obtaining the promissory note. *W. D.* had not a creditor in the world. The merchant who gave the promissory note to *W. D.* for 400*l.* had fortunately recommended him to Messrs. *Devaynes* and Co., bankers in London, by whom he was introduced to a respectable solicitor in Lincoln's Inn, by whose exertions the circumstances were explained and the scheme defeated. Q. *Was it not the duty of W. D. to endeavour to procure proper assignees?*

(b) *Ex parte Shaw*, 1 Gl. & J. 162.

(c) *Heane v. Rogers*, 9 Barn. & Cres. 587.



for an accountant and preparing his balance sheet were acts of acquiescence. To this it is enough to answer, he merely discharged his duty.

The next reason is, his applying for and obtaining an allowance for maintenance, which has lately been decided not to be an estoppel; *ex parte Giles*. (a)

The last proof of acquiescence is attempting to procure signatures to the certificate. The fact is denied, and not one creditor has signed it; nor has any one deposed that application was made to him to sign; but even if *Chambers* had asked creditors to sign, can that be enough, when in some cases, as in *ex parte Bass* (b), even the obtaining the certificate is not a bar? It was once imagined that proving a debt was acquiescence, *Walker v. Burnell* (c), *Stewart v. Richman* (d); but that doctrine has long been exploded, *Rankin v. Horner*. (e) The courts of law have constantly felt that the doctrine of acquiescence was attended with difficulty, and required great caution in its application; and have constantly expressed a hope that no evil might result, as the subject was peculiarly fit for equity, as in *Goldie v. Gunston* (f), where Lord *Ellenborough* said, though the party was barred at law, yet he might petition to supersede; which was approved by Chief Justice *Abbott* in *Watson v. Wace*. (g) So too insisting upon his discharge when in custody previous to the proof of a debt does not estop him from disputing the commission; *Mott v. Mills*. (h) Where a bankrupt, with

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

(a) *Ex parte Giles*, 1 Dea. & Ch. 548. (e) *Rankin v. Horner*, 16 East, 191.

(b) *Ex parte Bass*, 4 Mad. 270. (f) *Goldie v. Gunston*, 4 Camp. 381.

(c) *Walker v. Burnell*, Doug. 303. (g) *Watson v. Wace*, 2 Carr. & Pay. 171.

(d) *Stewart v. Richman*, 1 Esp. 107. (h) *Mott v. Mills*, 3 Carr. & Pay. 197.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

full knowledge of his rights, so acts as to lull his assignees into security, from which they have so involved themselves into engagements that they cannot extricate themselves; it may be an estoppel at law, and even in equity, if the Court cannot place the parties in the situation in which they stood before the act was done, as by compelling him to confirm sales or not to bring any action; but on the present occasion, who can contend that the assignees were for a moment lulled into any security?

There is no pretence for saying that in this case there has been any acquiescence, the utmost extent being, according to the opinion of Lord *Lyndhurst*, that it was a circumstance to be considered. His Lordship's words were: "It is said Mr. *Chambers* acquiesced till June 1826. The commission was sued out in 1825, and in that interval it does not appear that he attempted to set aside the commission, while, on the other hand, he took active measures towards the election of assignees; that does not estop or bar Mr. *Chambers* from disputing the commission: but at the same time it is a circumstance for consideration."

It is said, that if the commission be superseded, all the debts would be barred by the statute of limitations. Without inquiring into the correctness of this opinion, or relying upon the answer that this is no objection to the law taking its course, *Chambers* repudiates it; he is ready to waive it, or submit to any order the Court may make. It is said too that there have been various proceedings in equity which if the commission was superseded would be nullified; the answer is the same, *Chambers* is ready to confirm them.

The objections to the petitioning creditors debt are:—1st, There is no debt, it having been forfeited; 2dly, If there be any debt, it is an equitable debt; and,



3dly, Supposing there is a legal debt, it is not sufficient to support the commission.

We will first consider the third point. This is a joint commission, upon a joint debt of *Chambers* senior and *Chambers* junior, without there having been a partnership between them, except with a third party, *White*, who is not included in the commission.

Since the first creation of the bankrupt laws, more than 250 years, no such commission has ever existed, except in one case to which Mr. *Christian* refers, and which passed *sub silentio*. It is as follows:—"The following case lately came within my experience. Two men entered into partnership as builders of houses; in what dealing they contracted the petitioning creditor's debt, who sued out a joint commission; the commissioners thought the joint dealing was not a trading which subjected them to the bankrupt law. But each of them carried on a distinct trade; each of them individually being a trader subject to the bankrupt law. I was of opinion, as they might jointly be sued at law, and as there was much joint property, that they might be declared bankrupts under the joint commission; but several professional gentlemen were of a different opinion. But we made them bankrupts, and the commission was acquiesced in." (a)

A joint commission can only be supported on a joint debt, where the parties are joint traders, constituting the whole firm, except in case of dormant partnerships, when the creditor may elect to treat the debt as joint or separate (b); or except in cases within the

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

(a) 2 *Christian*, B. L. 90. 246, *contra*; *ex parte Hodgkinson*, 1 *G. Cooper*, 101; *ex*  
2d Edit.

(b) *Ex parte Hamper*, 17 *Ves.* *parte Read*, 2 *Rose*, 85; *ex parte*  
412; *Dubois v. Ludert*, 1 *Marsh*, *Norfolk*, 19 *Ves.* 455.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

6 Geo. 4, c. 16, sect. 16, which enacts that a commission against part of a firm shall be valid if a commission could have issued against the whole firm (*a*); and by section 62 the right of electing assignees is confined to the creditors of the whole firm (*b*), by which provision the intent of the legislature that a commission shall not issue against part of a firm, except upon a debt due from the whole firm, is manifest. These are the only exceptions, and therefore prove the general rule. The statute authorizes a commission against the trader, which is answered by the whole firm, or by one member; the act considers the trade, not the traders, as is expressly noticed in *Allen v. Hartley*, shortly reported in *Cooke*, but fully reported in 4 *Douglass*, 25, when the counsel attempted, but in vain, to reason against this doctrine. The act speaks of “a trader,” which may be construed by a single member of a firm, or the whole firm, which in law is considered as consti-

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(*a*) “Any creditor or creditors, whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of a firm, may petition for a commission against one or more partners of such firm; and every commission issued upon such commission shall be valid, although it does not include all the partners of a firm.” 6 G. 4, c. 16, s. 16. See also sections 17 and 89.

(*b*) “That in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or for either of such purposes; but such creditors shall not receive any dividend out of the separate estate of the bankrupt or bankrupts until all the separate creditors shall have received the full amount of their respective debts, unless such creditor shall be a petitioning creditor in a commission against one member of a firm.” 6 G. 4, c. 16, s. 62.



tuting one person ; section 3 says, "if any such trader," &c. ; and section 4, "any such trader shall," &c. ; and the same applies to the other clauses.

The commission is therefore bad at law ; but if it were good at law, yet this Court would not permit it to stand.

The first question is, whether the commission be good at law ; and the second, assuming its legal validity, whether the Court sitting in equity will permit it to stand ?

First, whether good at law ? Mr. *Cooke* says (a) : "Where a joint commission is prosecuted, all the ostensible partners must be included ; for a joint commission against two of several partners cannot be sustained ;" in support of which he cites *Allan v. Downes*. (b)

In *Streatfield v. Halliday* (c) it was admitted a commission could not be supported against two out of three partners. In *ex parte Henderson* (d), one of three traders being an infant, a joint commission issued against the other two, but was superseded ; and the

1835.

*Ex parte*  
CHAMBERS.

In the matter  
of  
CHAMBERS.

(a) *Cooke*, B. L. 9. 7th edit.

(b) The plaintiffs produced a commission against *Marlar* and *Stewart* only, to which it was objected that there was no such partnership, the firm being *Marlar, Stewart, and Boyd*. Mr. Justice *Buller* nonsuited the plaintiffs. Upon a motion to set aside the nonsuit, Lord *Mansfield* said, "There is no doubt there may be a commission against one partner separately, without making the rest of the partners bankrupts. So there may be a commission against all the partners

in one house, and under such commissions both the joint and separate estate will be assigned, and the different classes of creditors will have the shares allotted to each. But the objection to one of the present commissions is, that it is a commission against two of three partners. A commission may be joint or several, but this is neither."

(c) *Streatfield v. Halliday*, 3 *Ter. Rep.* 779.

(d) *Ex parte Henderson*, 4 *Ves.* 163.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

same principle is recognized by Lord *Mansfield* in *Allan v. Hartley*, 4 *Doug.* 20, who said that a commission against two of three partners is bad; it is also recognized by Lord *Eldon* in *ex parte Benfield* (a), and *ex parte Layton*. (b) The principle of this will appear clear when examined. In *Crispe v. Perrot* (c) it was settled that a joint debt from a firm will support a commission against one member of the firm; but it has never been supposed that it would support a commission against two or more members out of a greater number. And why? Not for want of a good petitioning creditor's debt, for the debt is as much due from two as from one, but because the debt must be due from a trader, that is, an individual or a whole firm. That a commission good at law may be superseded in equity, will not be disputed. In *ex parte Dufrene* (d) Lord *Eldon* said: "It did not follow that because the commission was valid at law, there might not be reasons rendering it supersedeable in equity;" and in *ex parte Gallimore* (e) his Lordship said: "It was the duty of the Court to guard against its process being abused."

It must be remembered that the whole law of joint commissions has been created in equity, and is frequently at variance with common law, and even with the bankrupt statutes. Equity follows the statute, in considering the trade and not the traders, and will not suffer a commission against two traders to stand, merely because they happen to be responsible under a joint liability. There can be no pretence for a joint commis-

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(a) *Ex parte Benfield*, 5 *Ves.* 425.

(b) *Ex parte Layton*, 6 *Ves.* 434.

(c) *Crispe v. Perrot*, *Willes*, 467.

(d) *Ex parte Dufrene*, 1 *Rose*, 333.

(e) *Ex parte Gallimore*, 2 *Rose*, 424. See page 429.



sion, when there are no joint assets, nor when the parties are engaged in different trades in different parts of the country. When there is joint property, it would be most unjust to the trade creditors that an individual creditor should receive 20*s.* in the pound, and the trade creditors perhaps not 20*d.*

The fundamental rule for the administration of estates under joint commissions is : “ That the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors ; and that the surplus shall be carried over ; ” — a rule to which Lord *Thurlow*, Sir *Samuel Romilly*, and Mr. *Christian* have constantly represented as illegal and unjust. Lord *Thurlow* used to say, that the separate creditors were injured as to their legal rights, by being estopped from issuing execution against both joint and separate estate for their debtors’ interest, in which Sir *S. Romilly* concurred, and Mr. *Christian* represented the rule as deciding by lottery. These objections may appear to have weight ; but when the whole bankrupt law is considered, the appearance will be found false ; for the joint property is in the reputed ownership of the firm, and the separate property in each member of the firm ; — a rule which wholly fails in a commission issued on a debt without a joint trading.

It is another rule under joint commissions, that the joint creditors shall elect assignees, for an obvious reason, viz. that they are interested in the joint estate ; a rule which would also fail if there is not a joint trading, as the joint property, if any, would be in the reputed ownership of the firm.

But it is submitted that the petitioning creditor’s debt is merely equitable. By deed of arrangement of the 10th of December 1824, the debt of the petitioning

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

creditor, who executed the deed, was from being a legal debt converted into an equitable debt. Under that deed 30,000*l.* and upwards was collected by the trustees, of which the whole, or nearly the whole, was distributed, so as to render it impossible for a court of law to take an account of the distribution among the creditors, and ascertain whether any and which of them were paid. Unless, therefore, the deed were revoked, the legal debt was gone, and will not support the commission; and with respect to the alleged revocation, it never was legally revoked. On this subject, Lord *Lyndhurst* in his charge to the jury said: “Your attention and the attention of the Court was directed to the clause in the deed, upon the construction of which the validity of the petitioning creditor’s debt must depend. Mr. *Pollock* gave formal proof of the revoking the letter of licence, but no further questions were asked of Mr. *Mayhew*. It is unfortunate your attention was not directed to this deed, and the facts connected with it, at an earlier stage in this cause. The clause is in these terms: ‘If Messrs. *Chambers* and Son shall knowingly or willingly,’ &c. &c. The committee did, in pursuance of this clause, in proper form revoke their licence; and if they were authorized in so doing, I am of opinion there is a sufficient petitioning creditor’s debt; and the sole question is, whether the committee had power to revoke?”

As to the act of bankruptcy, the petitioning creditor has not established one during ten years. In *Bernasconi v. Chambers*, which was commenced in May 1827, there was, it is true, a verdict for the assignees upon the ground solely of acquiescence. They did not venture to adduce any evidence in support of the commission, and the verdict was afterwards set aside. It was tried



a second time in April 1829, when another verdict was found for the assignees, which was again set aside ; and on the third trial, in December 1830, they obtained another verdict, which was also set aside ; and yet another action was tried in June 1833, when the assignees were nonsuited, and the King's Bench refused a new trial.

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

Mr. *Knight*, Mr. *Swanston*, Mr. *Kelly*, Mr. *G. Richards*, and Mr. *Arnold*, for the assignees :—

The objections to the prayer of this petition have to some extent been anticipated by the arguments adduced by the counsel for the petitioners ; the principal points in dispute have not, however, been touched upon. The question which must necessarily be determined, before the legal requisites of the commission can come under consideration, is not whether the acts of acquiescence by the bankrupts amount to an estoppel to their disputing the commission ; but whether the conduct of the bankrupts, previously to the commission, and for some time afterwards, was not such as to induce the assignees to suppose that the bankrupts had acquiesced ; or, in other words, whether the assignees were not, by the conduct of the bankrupts, lulled into security, and led to believe that no opposition would be offered to their working the commission. This is an application to the discretion of the Court ; and it is therefore necessary that the conduct of the bankrupts should be strictly examined. It will be seen from one of the affidavits that *Chambers* the elder, shortly before his opposition to this commission commenced, declared that he did not expect any dividend would be paid for twenty years, as he had determined to throw his affairs into Chancery ; and this affidavit is



1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

uncontradicted. This is the whole secret of the ten years litigation which has taken place. No question is raised as to whether this commission was properly or improperly issued, for of that no question is or can be made; the bank had stopped payment a year before, the insolvency of the parties was notorious; a composition had been attempted, and failed; the committee of management under the deed of inspectorship was, by the misconduct of Mr. *Chambers*, prevented carrying into effect the trust deed; and the letter of licence being revoked, what then remained but to issue a commission? It was issued accordingly, and with the advice both of the counsel and solicitor of the bankrupts, as the best and only mode of administering the estate. No fresh circumstances have been discovered to prove that this commission ought not to have issued. It is not pretended that the assignees cannot recover the property; on the contrary it is in evidence that they have received 153,000*l.*, and that they have revived an important suit in Chancery commenced by the bankrupts, and in that suit have obtained a decree. It is evident that no possible good can result to any party by superseding this commission; if superseded another must instantly issue. Is it to be superseded solely for the purpose of investigating the accounts of the assignees, or of overhauling their solicitor's costs? This is unnecessary, because those objects might be attained upon the application of any creditor. What then has been the cause of this ten years litigation? It is in evidence that the bankrupts made no opposition to the commission, until *Chambers* the elder failed in procuring the signature of the assignees to his certificate. This is the secret of the litigation, and the commission is now sought to be superseded for the fraudulent pur-



pose of favouring parties who have procured judgments from *Chambers* the elder, aided by attornies who make it a profitable speculation. The commission has never been disputed by any creditor. The only opposition has been by the bankrupt, and those in concert with him. Should the commission be superseded, the simple contract creditors, whose debts amount to 277,000*l.*, will be barred by the statute of limitations. [The counsel for the bankrupt here interposed, by authority of Mr. *Chambers*, and undertook not to take advantage of the statute.] Although the bankrupts may undertake not to avail themselves of that objection, the assignees under another commission, or an insolvency, or the other creditors, would not be bound by such an undertaking.

There is, however, a preliminary objection to this petition. The validity of the commission has been established by a judgment at law which has never been reversed; and this Court, sitting in equity or bankruptcy, has never taken upon it to sift the question, whether a judgment at law has been rightly pronounced or not; and although it has been held that this Court would relieve where injury had been suffered at law, yet that it has no jurisdiction, merely because a party has failed to establish his case at law.<sup>(a)</sup> After a judgment at law the party applying here must show equitable grounds for relief. <sup>(b)</sup> It is not pretended by the petitioners that the judgment in the Exchequer was obtained by fraud, which is the only equitable ground for relief. It is admitted that the legal validity of a commission is no answer to an application to this Court to supersede; but it is equally true that the mere circumstance of a commission being invalid at law does not prevent this

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

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(a) See *Protheroe v. Forman*, 2 Swanst. 227.

(b) *Eyre v. Everett*, 2 Russ. 381.



1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

Court from upholding it. (a) Unless equitable grounds for relief are shown, the bankrupt cannot petition to supersede his commission after its validity has been established at law, *ex parte Bass*. (b) This is an application to supersede for want of the legal requisites to support the commission after its validity has again and again been established at law. Waiving, however, the circumstance that the petition does not state any equitable grounds for superseding, the next objection is that the bankrupts have acquiesced under the commission. As to the petitioning creditor's debt and the trading, they are sufficient; and although the act of bankruptcy upon the proceedings may not have been so satisfactorily established, yet there is abundant evidence before the Court of an act of bankruptcy sufficient to decide the question in an appeal to the discretion of the Court. The other objections are merely technical; and but for the decision in *Maggs v. Hunt* (c) would never have been relied upon. The argument amounts to this, that trading and acts of bankruptcy, prior to the 6 Geo. 4, c. 16, were done away with; for this is the only difference between the effect of the arrest in June or in November.

The question with reference to acquiescence by the bankrupts is, whether their conduct was such as to induce the assignees to suppose they might safely act. What are the facts? The commission issued on the 19th November 1825, and the adjudication appeared in the Gazette on the 22d. The first public meeting was on the 25th. It is admitted that the mere surrender by a bankrupt under a hostile commission for the pur-

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(a) *Ex parte Lees*, 16 Ves. 472.

(b) *Ex parte Bass*, 4 Mad. 270.

(c) *Maggs v. Hunt*, 12 Moore, 357; 4 Bingh. 212.



pose of obtaining his protection is no acquiescence, it being his duty to surrender ; but if it appear, as in this case it does, that it was important that the bankrupt should have his protection, and for that purpose that he did acts beyond his duty, such conduct does amount to acquiescence. It is proved by the evidence, that at the date of the commission it was of vital personal importance to Mr. *Chambers* to obtain his protection ; writs were at that time out against him for sums amounting to upwards of 29,385*l*. For the mere purpose of obtaining his protection a private meeting was called at the request of the bankrupt, at which he surrendered, and obtained it. The meeting for the choice of assignees was held on the 7th December, which was adjourned to the 23d, when the first choice of assignees took place, which was afterwards set aside. During the whole of this period it is in evidence that the bankrupt was in constant communication with the petitioning creditor, and writing to him on the most friendly terms, and aiding the parties in making out the accounts. Before the second choice of assignees took place, the bankrupt interfered by getting powers of attorney from creditors to vote in that choice. On the 23d of December the bankrupts presented a petition to the great seal, containing an allegation that this commission was duly issued, and that they had been duly declared bankrupts under it ; that they were preparing their accounts to enable them to pass their examination, and praying an enlargement of time for that purpose, which was granted. The meeting to take the last examination of the bankrupts was adjourned accordingly, and the memorandum of the adjournment was signed by both the bankrupts. From the issuing of the commission until April 1826, the bankrupts interested themselves under the commission, and took a part in

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

the private meetings of the assignees. From a letter of *Chambers* the elder to the petitioning creditor, of the 14th of April 1826, it appears that up to that period the bankrupts had no intention of disputing the commission. About the time this letter was written, *Chambers* the elder applied to the assignees to sign his certificate, but they refused in consequence of his misconduct; and in June following he, for the first time, declared his intention to dispute the commission; but no proceedings were taken by him for that purpose until 1827, when the petition to the Vice-Chancellor was presented. That petition was dismissed on the 27th April 1827, and from that decision no appeal has been presented. We therefore submit that the conduct of the bankrupt was such, for one year and more after the commission issued, as to lull the assignees into security, and to induce them to suppose that they might act, and that such conduct must, upon an application to the discretion of this Court, be construed strictly against the bankrupts. Upon the facts of this case, this Court or the Court of Review would, upon the application of the assignees, have interposed by injunction to restrain the bankrupts from disputing the commission. Although the acts of the bankrupts may not amount to a legal estoppel, yet their conduct may have been such as to justify the equitable interposition of this Court. This case does not differ from *Flower v. Herbert* (a), which has been followed in *Like v. How* (b), and *Clarke v. Clarke*. (c) The question in these cases is not whether the acts of the bankrupts amount to legal estoppel, but whether they have not by their conduct precluded themselves

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(a) *Flower v. Herbert*, 2 Ves. sen. 526.

(b) *Like v. How*, 6 Esp. 20.

(c) *Clarke v. Clarke*, 6 Esp. 61.



from an application to the discretion of this Court. The bankrupts here intended to acquiesce under the commission, and never would have disputed it, if the assignees had not refused to sign their certificate. It is impossible for this Court to place the parties in the situation in which they would have been, had not the bankrupts led the assignees to suppose they might act. They have made sales and entered into contracts for the sale or letting of parts of the estate, and have actually carried on a suit in this Court, and obtained a decree.

The objections to the petitioning creditor's debt cannot be sustained. It is contended that the petitioning creditor having executed the deed of inspectorship, his debt was converted into an equitable debt, pending the operation of that deed. We do not contend to the contrary, but we insist that the deed of inspectorship was duly revoked; and thereupon, by the terms of the deed, the parties were restored to their legal rights. It is said that the deed was not properly revoked, but the question is not as to the form of the revocation, but whether any acts were done by the bankrupts to justify the committee, under the terms of the deed, in the revocation. Lord *Lyndhurst* says in his judgment, which has been referred to by the counsel of the petitioners,—“If nothing was done of that kind by the bankrupts, it does seem to me the committee had no right to revoke the licence.” But upon the occasion of Lord *Lyndhurst*'s judgment being given, the assignees had not come prepared with evidence of the acts which led the committee to revoke the deed, formal proof only was offered of the execution and revocation of the deed. Evidence is now before the Court of the acts of the bankrupt which led to the revocation of the deed. There is no doubt that the bankrupts by these acts brought themselves within the terms

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS:

of the deed; it is submitted that the letter of licence was properly revoked, and the petitioning creditor restored to his rights. But the petitioner has no right here to question the validity of the revocation, the question having been already determined at law.

Then as to the other objection, that the petitioning creditor's debt is not sufficient to support this commission, which is a joint commission against two out of three partners, while the debt was owing from the two bankrupts only; and it has been stated that there is no case deciding that a debt from two out of three partners will support a commission against the two. The answer to which is, there is no case deciding that it will not. But a separate execution can issue on a joint judgment; and unless the petitioners can deny that, their objection must fall to the ground. The debt need not be connected with the trade. The trading here was by the three, but the only property to be administered was the joint property of the two. But the validity of the trading as connected with the petitioning creditor's debt has been established by Lord *Tenterden*. (a) *Streatfield v. Halliday* (b) is the only case in support of the objection, and this case was decided before the 6 Geo. 4, c. 16, sec. 16, came into operation. The case put by Mr. *J. Buller* in *Allan v. Hartley* (c) is precisely the present case. The trading has invariably been established; upon the word "bankers" it has been decided in *Bernasconi v. Farebrother* (d) that it is not necessary that the particular specific trading should be set forth in the commission, and that the description required was such only as not to mislead.

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(a) *Ante*, page 448.

(c) *Allan v. Hartley*, 4 Doug. 20.

(b) *Streatfield v. Halliday*, 3  
 Ter. Rep. 779.

(d) *Bernasconi v. Farebrother*,  
 10 Barn. & Cres. 549.



The act of bankruptcy by *Chambers* the elder is the only question open to argument, and if that should appear doubtful, the acquiescence of the bankrupts must be borne in mind.

On the whole, we submit that the bankrupts have acquiesced under this commission, and are precluded from applying to the discretion of this Court for relief. That the legal requisites are sufficient: and that no ground for the equitable interposition of this Court has been stated.

Sir *W. Horne*, Mr. *Wakefield*, and Mr. *A'Beckett* for the petitioning creditor.

Sir *W. Horne* contended, that as the bankrupt was in contempt for refusing to be examined under his commission, he could not be heard; *ex parte Maginnis* (a); In *ex parte Bullock* (b) the bankrupt petitioned to supersede after attainder unreversed, and his petition was dismissed, but Mr. *Wakefield* admitted that he could not, after the cases decided, argue that point.

The conduct of the petitioning creditor is not sought to be impeached, and he stands clear of all the misconduct and illegality of proceeding imputed to the assignees and their solicitor, and yet the present two petitions pray relief against him only, and not against the assignees;—he has been no party to the proceedings at law, except in an action commenced by *Chambers* the elder against him for breach of covenant under the deed of inspectorship, but that action was not proceeded in. The proceedings at law, to which he was no party, cannot be

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

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(a) *Ex parte Maginnis*, 1 Rose 84.

(b) *Ex parte Bullock*, 11 Ves. 452.



1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

adduced against him. The question of supersedeas is between the petitioning creditor and the bankrupts. The question as to the conduct of the petitioning creditor was raised in the first petition, which was dismissed, and against the dismissal of which the bankrupts have never appealed, and they cannot come here except upon appeal.

The creditors are satisfied with the commission; the estate is insolvent, and the bankrupt has no interest in his present application, there being no surplus. If this commission were superseded, another would inevitably issue, and it is a choice between two commissions. The bankrupt can derive no benefit by a supersedeas.

During the arguments, the counsel for the assignees proposed to read, as evidence in support of their case, the examinations of third persons taken before the commissioners. To this Sir *W. Follett* objected, as the bankrupt had been no party to those proceedings, and, consequently, had no means of cross-examination.

Mr. *Knight*, in support of his right to read the examinations: — The parties have been requested to verify their examinations by affidavit, but have declined; and notice was given of our intention to read the examinations. Will it be contended that if a party refused to verify a letter written by him, it could not be used?

The Court allowed the objection. (a)

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(a) See as to the practice in 51; *ex parte Burt*, 1 *Mad.* 46; the Court of Review on reading *ex parte Scrivener*, 3 *Ves. & Bea.* examinations, *ante*, page 397. 14; *re Goodwin*, *Mont. & Bl.* See *ex parte Campbell*, 2 *Rose*, 304.



Mr. *Knight* proceeded to apprise the Court of the contents of the examinations, to which he contended the Court was bound to look.

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

Sir *W. Follett* objected:—The Court has decided that the examinations of third persons cannot be read as against the bankrupt. How is this application to be supported?—by affidavits. The bankrupt cannot examine parties under the commission. With what view, then, can the contents of these examinations be brought before the Court? It is admitted that the Court may look at the proceedings, to satisfy itself of certain facts; but what is not evidence in open Court is not evidence to the judges of the Court in private. The contents of such examinations ought not to be stated. *Ex parte Campbell (a), ex parte Scott. (b)*

Mr. *Knight*:—It is essential that the proceedings should be looked at by the Court, particularly with a view to further inquiry. Lord *Eldon* was in the constant habit of reading the proceedings.

Sir *W. Horne* for the petitioning creditor:—It is admitted that the Court has a right to look at the examinations; if it be the right of the Court to do so, it is their duty. Further evidence as to the act of bankruptcy and requisites is frequently adduced upon subsequent examinations. The Court looks at them for the same purpose as to the answer of a co-defendant, which is not evidence for the other defendant affirmatively. No decree can be made against a positive denial in an answer, contradicted by one witness only.

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(a) *Ex parte Campbell*, 2 *Rose*, 51.

(b) *Ex parte Scott*, *Buck*. 280.



1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

So with respect to examinations of third parties under a commission, although not conclusive, yet to the Court they may be of such a nature as not only to justify, but absolutely to call for further inquiry; and an inquiry has been directed; *ex parte Fowles*. (a) I may, on the part of the petitioning creditor, assume that the assignees have done their duty—that there is upon the proceedings evidence of a good act of bankruptcy, and it is the duty of the Court to look at them to see that the assignees have done so.

*Per Curiam* :—In *ex parte Campbell* (b), the depositions were tendered and rejected, and one reason was, that they were taken in the absence of the party sought to be affected by them, and so in *ex parte Coles* (c); in *ex parte Scott* (d), although the depositions do not appear to have been tendered, the same point is settled. Lord *Eldon* was certainly in the habit of seeing the proceedings, and we have a right to see them; nevertheless between the parties litigant they are not evidence. Any statement of their contents, therefore, must be unnecessary.

The counsel for the assignees tendered as evidence some rules in the King's Bench in an action between the sheriff and the assignees, in which the bankrupt was not a party.

Sir *W. Follett* objected to their being read, not having been verified, and no notice given to read them.

The Court allowed the objection; but said that the parties might have an opportunity of verifying them.

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(a) *Ex parte Fowles*, Buck. 98.

(b) *Ex parte Campbell*, 2 Rose, 51.

(c) *Ex parte Coles*, Buck. 242.

(d) *Ex parte Scott*, Buck. 280.



Sir *W. Follett* in reply: — The petitioner hopes for a final decision upon the law and facts. The commission is illegal, wanting the requisites. This alone is a sufficient ground for a supersedeas, and this Court is bound to supersede. The other side contend that the bankrupt cannot be heard, as no equitable grounds for relief exist. Is it not enough to justify an application here, that the conduct of the assignees and their solicitor throughout has been uniformly improper, and that they have endeavoured to support the commission by perjury? It has been objected that the bankrupt has no interest, the estate being insolvent, and there being no surplus. This latter point cannot be assumed, and the assignees therefore cannot say that the bankrupt has no interest. What has become of the assets already collected under this commission, amounting to upwards of 153,000*l.*? The solicitor of the assignees alone is the party interested in upholding the commission, and the assignees undertake to bear the responsibility of his conduct. The law has been abused for the purpose of debarring the bankrupt from contesting the commission. Immediately upon the dismissal of his petition by the Vice-Chancellor in 1827, he was arrested at the suit of the solicitor and his co-trustee, for the express purpose of compelling him to acquiesce. The debt was a mortgage debt; the interest had been paid. The action was upon the covenant for payment of the money. Ejectment was brought, and possession obtained; but the bankrupt is still in prison, and detained there by the solicitor to the assignees. It has been urged that the bankrupt is in contempt for not submitting to be examined under this commission, the validity of which he disputes; but to be consistent, he was bound not to submit.

It has also been urged, that as no appeal has been made from the judgment of the Vice-Chancellor, and therefore

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

that the bankrupt cannot be heard. If, indeed, the judgment of the Vice-Chancellor proceeded upon the same grounds as are now relied upon by the bankrupts, that objection might be good; but the ground of the present application was expressly left open by the Vice-Chancellor. The petition to his Honor alleged collusion between the petitioning creditor, the assignees, and their solicitor; but the bankrupts do not now depend upon that. The meaning of the parties being left to law was, that they might, upon the result of any proceedings they might take, again apply; a totally distinct ground for relief. The proceedings at law have accordingly been taken, and on the result we come here, the invalidity of the commission at law being shown. Then it is urged that the Court will not interfere if the bankrupt has acquiesced; but the bankrupt has not acquiesced; so that if the commission is invalid, the Court must supersede, and has no discretion; *ex parte Dick*. (a) What is the alleged acquiescence? In June 1826 the bankrupt first gave notice of his intention to dispute the commission, having, it is alleged, so acted previously to that time as to lull his assignees into security: the question of acquiescence was then mooted by the assignees, on the petition before the Vice-Chancellor, who, so far from being of opinion that the bankrupt was concluded by his acts, left him to proceed at law. Up to April 1827, therefore, there is a judgment that there was no bar by acquiescence, and from that period to the present time the contest has been uninterruptedly continued. But even supposing that up to June 1827 the bankrupt had acquiesced, another and most important question arises, viz. was he during that period cognizant of his rights? Did he know the law as applicable to his

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(a) *Ex parte Dick*, 1 *Rose*, 51.



case, and which was not known even to the profession until the decision in *Maggs v. Hunt*. (a) If not, we submit it would be most unjust that he should be bound by acts done in ignorance of his rights. Upon the mere acts alleged against him there can be no question, and clearly are not such as will bring this case within the rule of estoppel; *Heane v. Rogers*. (b) The opinion also of the Vice-Chancellor in 1827, and of Lord *Lyndhurst* in *Chambers v. Bernasconi* (c), are decisive against them.

1835:  
—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

With respect to the judgment at law in *Chambers v. Bernasconi* (c), which is said to be conclusive, and to preclude this Court from interfering, the party does not come here for relief consequential upon a legal right established at law, in which case the Court might refuse to inquire into the propriety of the judgment, which, unreversed, establishes the right. The judgment is brought before the Court in this case only as evidence of a fact one way or other, and is no more conclusive than any other proceeding at law, from which the Court may be more or less affected with the evidence it affords of the fact, and the Court is not only entitled, but bound to look into all the circumstances affecting the question upon which the judgment proceeded.

It is then said, that even admitting the invalidity of this commission, and that the bankrupt is not debarred by his acts from applying for a supersedeas, yet that no possible good will result, and that another commission must inevitably issue; but the Court in superseding may impose terms upon the bankrupts. With respect to the simple contract debts, the bankrupts are willing to

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(a) *Maggs v. Hunt*, 4 Bingham. 212; 12 Moore, 357.

(b) *Heane v. Rogers*, 9 Barn. & Cres. 587.

(c) *Chambers v. Bernasconi*, 4 Tyrw. 531.



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

admit them, and such an admission would be binding upon all persons claiming under them. The debts barred by the statute may be thus revived under Lord *Tenterden's* act.

*Cur. ad. vult.*

August 24.

Lord Commissioner *Pepys* delivered the judgment of the Court:—

After going through the facts of the case, and the several trials showing the history of the litigation at law relative to the validity of the commission, his Lordship said, there is no doubt the petitioning creditor's debt originally was good; but the objection to it is, that by a deed entered into (containing the letter of licence) it has become an equitable debt, and not sufficient to support the commission. It is said that the letter of licence was never properly revoked, because the parties revoking it had not been properly elected. This turns upon an inspection of the deed; but were it otherwise, the many verdicts obtained by the assignees, and not set aside or questioned upon that ground, amount to such an establishment at law of this legal question as to render it unavailing here as a ground for supporting a supersedeas. A similar observation applies to the trading; had this been thought a tenable point, the contest would not have proceeded upon the act of bankruptcy. All the verdicts for the assignees establish the trading, and every application to set them aside upon other grounds amounts to an admission that upon this ground the commission is unimpeachable; it cannot, therefore, now be raised as a ground for a supersedeas.

The objection to this commission as being a joint commission against two, being joint traders with a third partner not included in the commission, is a point of much importance as affecting other cases, but not of



any material importance now to be considered. No case upon the subject one way or the other has been quoted. There is, indeed, an opinion of Mr. *Christian* (a) upon the very point; but that opinion is stated by him to have been questioned and differed from by other competent persons. The old acts of parliament give no assistance in the solution of this question, and it has been contended in argument that this was a question for the consideration of the Great Seal only, and that therefore we should now decide whether this be not a proper ground for superseding; it is, however, clear that in questioning the propriety of joint and separate commissions, the courts of law have considered it only as affecting the legal validity of the commission. *Crispes'* case (b), which was cited as applicable to this case, only decided that the joint creditors of a firm might safely sue out a commission against a separate partner of that firm. *Allen v. Downes* (c) only decided that a joint creditor could not sue out a joint commission against some of several parties, but must include all or be separate against each, which went directly to decide (although the acts of parliament are silent upon the subject) that the courts of law considered it as a question of law, whether it was a commission which was properly made a joint commission, or whether other persons who were omitted ought not to have been included, and therefore it was decided that upon a debt due from a firm all must be included, or a separate commission issue against each. The case of *Streatfield v. Halliday* (d) did not

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

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(a) 2 *Christian*, B. L. 310, 1st edit.

(b) *Crispes'* case, *Willes*, 467.

(c) *Allen v. Downes*, *Cooke*, B. L. 9.

(d) *Streatfield v. Halliday*, 3 Ter. Rep. 779.



1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

prove any thing to this point, the question raised there being after verdict. There were several suppositions which would have been sufficient to support the verdict; and as to Mr. *J. Buller's* observation that there might have been two commissions, one against the two, and another against the third, nothing in that case goes to prove that the three had carried on trade together. A commission against the two might have been sued out by a joint creditor of the two in their joint trade, and a commission against the third by a creditor of his in his separate trade. These cases, however, prove that the courts of law have considered the question, whether a commission ought to be joint or several, as a question touching the legal validity of the commission, and not a question for the Great Seal only, and so Lord *Eldon* expressed himself in *ex parte Henderson*. (a) If therefore this be an objection at law, it has been decided in favour of the commission in every instance in which a verdict has passed for the assignees, none of which have been set aside upon this ground, and in the only instance in which the point was raised Lord *Tenterden* decided against it; and the Court of King's Bench upon the motion for a new trial confirmed his decision. As a legal question, therefore, this must be considered as concluded; and if it were a question for the Great Seal only, it has been open ever since the commission issued. No difficulties are likely to arise with respect to the administration of the property under this commission upon this point; the whole of the property of the partnership belongs to the two, and little or no property of the third. Without therefore expressing any opinion as to what may be the proper course to be

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(a) *Ex parte Henderson*, 4 Ves. 164.



adopted upon an application to supersede on this ground on any future occasion, there does not appear any sufficient reason for superseding in the present case.

1835.

*Ex parte*  
CHAMBERS.

In the matter  
of  
CHAMBERS.

The act of bankruptcy by *Chambers* the younger must be considered as established at law, and it is impossible now to listen to the affidavits of persons who might have been examined upon the trials. The next question is the act of bankruptcy of *Chambers* the elder. It must be borne in mind that this case comes before us, not upon evidence taken upon an issue directed by this Court, but upon the result of actions which the parties have, in the exercise of their right, instituted among themselves. The result is, that after four trials the assignees have failed in proving an act of bankruptcy by *Chambers* the elder, and that in two trials he has had verdicts against him in actions brought by himself.

His Lordship then detailed some of the proceedings at law, with reference to the proof of an act of bankruptcy by *Chambers* the elder, and proceeded as follows:—

If the Court were now at liberty to look into the various points which have been before the several juries, and if it were safe and proper, according to the practice of this Court, to come to a final conclusion, upon such knowledge of the proceedings on those trials as the Court has been put in possession of, it would yet be impossible upon this evidence to say that the fact of an act of bankruptcy having been committed by *Chambers* the elder has been proved.

Various objections have been raised to our entertaining the question or coming to any conclusion as to the fact of there having been an act of bankruptcy or not, and as to our adopting any course of having this fact once more fairly investigated at law. It is said that the bankrupt has acquiesced, and that the dismissal of the



1835.

—  
*Ex parte*  
 CHAMBERS.  
 In the matter  
 of  
 CHAMBERS.

petition by the Vice-Chancellor in 1827, from which there has been no appeal, and the judgment in *Chambers v. Bernasconi* (a), are conclusive against him, and a bar to his relief here, and that the Great Seal has no jurisdiction to interfere where a commission has been established by a verdict at law. It is important to ascertain at what time the acquiescence commenced. In June 1826 the bankrupt gave notice of his intention to dispute the commission. In April 1827 the Vice-Chancellor dismissed the first petition, being of opinion that the equitable grounds stated did not entitle the bankrupt to a supersedeas; but he expressly guarded himself against giving any opinion as to the legal objection, and so far from being of opinion that the bankrupt was to be concluded by what had taken place since the commission issued, he left him to law for the purpose, if he could, of shaking the commission. Up to April 1827, therefore, there is the judgment of Sir *John Leach*, that there was no bar by acquiescence, and from that period to the present time the contest has gone on at law. But there is another ground most important to be attended to, because neither in bankruptcy nor any other proceeding can it be right, nor is it consistent with the rules and practice of this Court, to consider a party bound by acquiescence when not cognizant of his rights. It is quite clear, that before the decision in *Maggs v. Hunt* (b), in May 1827, the bankrupt could not have been, nor were the assignees or any parties to the proceedings, cognizant of the law as applicable to the case which each party had to consider. It would, therefore, be an extreme hardship to hold a party bound by acts adopted and taken in ignorance of his rights.

A party is not bound by acquiescence when ignorant of his rights.

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(a) *Chambers v. Bernasconi*, 4 Tyrw. 551.

(b) *Maggs v. Hunt*, 4 Bing. 212.



The particular acts of acquiescence, however, relied upon, are clearly not such as amount to estoppel, as laid down most correctly by Mr. *J. Bayley* in *Heane v. Rogers*. (a) And the Vice-Chancellor in 1827, and Lord *Lyndhurst* in *Chambers v. Bernasconi* (b), were of this opinion.

1835.

—  
*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

It is then said that the verdict in *Chambers v. Bernasconi* (b) is conclusive, and that when parties have established their right at law this Court will not examine into the propriety of the judgment, or give relief because that judgment may be erroneous. It is a well-known rule that there is no equity merely to set right an erroneous decision at law: and it is also true that where parties come into a court of equity for relief consequential to a right established at law, this Court will not inquire into the propriety of the judgment at law, as in cases where an account depends upon a legal title, or upon a patent, or copyright, this Court gives consequential relief arising from the legal right, and will not inquire into the propriety of the judgment, which, whilst it stands, establishes the right. The verdict, therefore, in this case brought before us, can only be used as evidence of a fact, and is no more conclusive in this Court than any other proceeding at law adduced as evidence of facts brought under its consideration. If the judgment at law were so conclusive at law as to debar a party there from disputing his commission, it would operate strongly upon the discretion of this Court; but that is, not so, he is concluded by the judgment only as to the subject matter of the action, and not as to the question upon which the judgment proceeded. The Court is there-

Relief against  
judgments at  
law.

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(a) *Heane v. Rogers*, 9 Barn. & Cres. 587.

(b) *Chambers v. Bernasconi*, 4 Tyrw. 531.



1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

fore of opinion, that the petitioner is not precluded by the judgment, and that we are not only entitled but bound to look into all the circumstances of the case as affecting the question of the act of bankruptcy, and that the result of that investigation does not satisfy us that a sufficient act of bankruptcy has hitherto been established.

Then it is said that the supersedeas is discretionary, and that injury will arise from superseding, and the case of *ex parte Munk* (a) has been cited to show that a supersedeas may be refused if the commission want the legal requisites; but that case only establishes what many others might be adduced to prove, that a bankrupt might so conduct himself as to be precluded from the right to dispute his commission. Considering, however, the very severe nature of the bankrupt laws, it requires a very strong case to induce the Court to preclude a man from being permitted to show that he was not a bankrupt, and that he had been improperly deprived of his property. The Court has been called upon to order a supersedeas upon the facts before it without further enquiry, but this the Court cannot do. Strictly speaking, we know only the result of two actions, and not the evidence that led to them; and looking merely at the history of the actions, there are four verdicts out of five in support of the commission, and only one against it, which was set aside. It is true that three of these four verdicts were afterwards set aside, and that the only one that stands was obtained upon evidence afterwards proved to be unworthy of credit. Upon conflicting verdicts and judgments at law, the whole case turning upon the credit of the witnesses, this Court cannot safely take upon itself the decision of a question of fact.

It requires a  
very strong case  
to restrain a  
bankrupt from  
disputing his  
commission.

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(a) *Ex parte Munk*, 1 Mont. & Ayr. 612.



It is said that great injury will arise from superseding the commission; but if the petitioner is in fact entitled to it, however much that may be regretted, yet he must have justice done him; but the result will not be so, nor would the question be settled by dismissing the petition. If upon the result of the issue, the commission cannot be supported, the Court will take care, in superseding, to do justice to all parties, and above all, to those who are strangers to this contest, but whose interests might be affected: if the commission prove valid, the Court will prevent the property being wasted, or the creditors delayed by any further litigation.

There must be an issue to try whether, at the time of issuing the commission, *Chambers* the elder had committed an act of bankruptcy.

An application was made by Mr. *Montagu*, on behalf of the bankrupt, that there should be, according to the discretion of the commissioners or one of the masters of the Court, such reasonable sum allowed as might enable the bankrupt to meet the expences of the issue; he admitted there was no precedent, and the Court refused to make an order.

1835.

*Ex parte*  
CHAMBERS.  
In the matter  
of  
CHAMBERS.

*Ex parte* HEWIT.—In the matter of  
JOHNSTON.

MR. S. SHARPE:—In this case an assignee, some time ago, bid for and became the purchaser of part of the bankrupt's estate, without leave of the Court, and laid out sums in improving the estate: he is now in-

C. of R.  
May 25,  
1835.

If an assignee purchase part of the bankrupt's estate, and improve, the estate must be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. (a)

(a) See *ex parte Bennett*, 10 Ves. 400.



1835.

*Ex parte*  
HEWIT.In the matter  
of  
JOHNSTON.

formed of the irregularity of his proceeding, and asks that the same order may be made as in *ex parte Hughes*. (a)

*Per Curiam* : — Let the registrar appoint a solicitor to conduct the sale; in other respects take the same order as in *ex parte Hughes*. (a)

C. of R.  
May 29,  
1835.

Furniture, the separate property of one partner, used by the firm, is not in the reputed ownership of the firm, *ut semble*.

*Ex parte* HARE. — In the matter of FEAR, and in the matter of HENRY and JAMES COWARD.

PREVIOUS and up to August 1833 *Henry Coward*, *James Coward*, and *Richard Moore* carried on business (at Bond-street, Bath) as linen-drappers. The lease of the house at Bond-street was in the name of *Henry Coward*, but it was taken for the purposes of the partnership; and it was agreed that the rent, taxes, and rates should be paid out of the partnership assets of *Henry* and *James Coward*. Certain plate, linen, and household furniture, the property of *Henry Coward*, were sent from his private

(a) The order in *ex parte Hughes*, 6 Ves. 617, was as follows:—A reference to the master to inquire what sum of money *Hughes* has laid out *bond fide* in substantial improvements of the property, and that the estate shall be sold before the master; and one condition of the sale shall be that it shall be put up at a price constituted by the sum of 2,010*l.*, and the amount of the sum so laid out upon substantial improvements; that if it sells for more, *Hughes* shall be paid out of the produce the amount of the substantial improvements. Declare if no one bids beyond that amount, that in that case it is for the interest of all the creditors and the bankrupt that *Hughes* shall be held to his purchase. Direct the other property likewise to be sold before the master, and reserve the costs of all these proceedings, with liberty for any of the parties to apply after the sale.



house to the house in Bond-street. On the 10th of August 1833 the partnership was dissolved as to *Moore*. *James Coward* resided on the premises at Bond-street, and had the use of the furniture; *Henry Coward* only took his meals at the house. On the 10th of September 1833 a separate fiat issued against *James Coward*. On the 4th of December 1833 a joint fiat issued against *Henry Coward* and Mr. *Fear*, with whom he was in partnership, independently of his brother *James*. The petitioners were chosen assignees.

The furniture, &c. on the premises at Bond-street was seized under the separate fiat against *James Coward*.

This was a petition that the furniture, &c. might be delivered up to the petitioners, to be distributed among the separate creditors of *Henry Coward*.

The affidavits in support alleged it to be notorious in Bond-street that the furniture was *Henry Coward's*.

Mr. *Swanston* and Mr. *Ayrton* for the petitioners:—

This case is not within the clause of reputed ownership: *Henry Coward* was lessee of the house, the furniture was his, and was as much in his possession as in that of his partners: if in the reputed ownership of any person, it was in that of the partnership, and therefore not distributable under the separate fiat against *James Coward*. The 6 Geo. 4, c. 16, sec. 72, provides for two cases,—the first where the bankrupt has “in his possession, order, or disposition any goods or chattels whereof he was reputed owner,” and the second case, “or whereof he had taken upon him the sale, alteration, or disposition as owner.” The evidence proves that the bankrupt *James Coward* was not within the first part of the clause, that is “reputed” the owner, and he clearly never took on himself the sale, &c. within the second part. The case therefore is not within the words of the

1835.

Ex parte  
HARE.

In the matter  
of  
FEAR  
and others.



1835.

—  
*Ex parte*  
 HARE.

In the matter  
 of  
 FEAR  
 and others.

act, which is not to be extended to cases not within its immediate words, *Greening v. Clark*. (a) The partner *James Coward* was in possession; one partner always lives in the house of business;—but mere “possession” is not mentioned in the act, and ought not to raise an inference of reputed ownership. (b) If a bankrupt be one of several tenants in common (which a partnership most resembles) the property so held is not in his reputed ownership; *Flynn v. Matthews*. (c) When, as here, the bankrupt never was owner, then mere possession is not enough to create reputation of ownership, *Storer v. Hunter* (b); in such case the assignees must prove the property to be within the 72d section. (d)

Mr. *Spence* and Mr. *Bellamy* for the assignees of *James Coward*: — In *ex parte Smith* (e), utensils of trade, the property of one partner, were used by the partnership; the decision there was on a point foreign to the present question; but it was admitted that they were in the reputed ownership of the partnership. [Sir *John Cross*:— That case was decided on another ground, and the counsel might, to avoid argument, have admitted that reputed ownership applied, being so strong on the other ground. But there is no case deciding that the separate property of one partner being on the partnership premises is in the reputed ownership of the other.] Either *James Coward* or the partnership were the owners. [Sir *George Rose*: — That is the point. This is not a question of reputed ownership.] We therefore claim, 1st, because

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(a) *Greening v. Clark*, 4 Barn. & Cres. 318.

(b) *Storer v. Hunter*, 3 Barn. & Cres. 376.

(c) *Flynn & Matthews*, 1 Atk. 185.

(d) *Lingard v. Messiter*, 1 Barn. & Cres. 312; *ex parte Wiggins*,

2 Dea. & Ch. 270.

(e) *Ex parte Smith*, Buck.

149.



the property belonged to the partnership, or 2d, as having been in the reputed ownership of *James*.

1835.

*Ex parte*  
HARE.

In the matter  
of  
FEAR  
and others.

Mr. *Swanston* in reply:— The other side have not proved any reputation of ownership in *James Coward*; moreover, they have not proved the time of the act of bankruptcy. Even supposing the property to be joint, and that *Henry Coward* alone became bankrupt, that would not place the property in the reputed ownership of *James Coward*. Then suppose *James Coward* alone bankrupt, would it be in his reputed ownership? To enable the statute to act through a joint possession, both must become bankrupt at the same moment; it was *Henry Coward's* property, for which he might have brought an action of trover.

*Per Curiam*:— This furniture was so treated, not only on the occasion of the dissolution as to *Moore*, but throughout, as to have been converted into partnership property. The separate creditors of *Henry Coward* have therefore no claim to this furniture; but if the question depended on reputed ownership, this would not be a case in which the furniture would have been in the reputed ownership of the firm.

Petition dismissed. Costs of both parties out of own estate.

*Ex parte* BLAKE. — In the matter of CALTHORPE.

C. of R.  
Nov. 4,  
1835.

MR. SWANSTON:— There were three partners. A separate fiat issued against one of the partners; then another separate fiat is to be issued against another of

If a fiat issue  
against one  
member of a

firm, another fiat against another member will be ordered to go to the same commissioners.



1835.

*Ex parte*  
BLAKE.In the matter  
of  
CALTHORPE.

the partners. The 6 Geo. 4, c. 16, sect. 17, enacts, "that if, after a commission issued against any two or more members of a firm, any other commission or commissions shall be issued against any other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed." That clause speaks of "two or more;" this was against one only; therefore the office think the new fiat cannot issue to the same commissioners.

*Per Curiam* : — Take an order that the second fiat may go to the same commissioner.

C. of R.  
Nov. 5,  
1835.*Ex parte* STEPHENS. — In the matter of BILLING.*Ex parte* THOMPSON. — In the matter of BILLING.

The service of a petition to dismiss a petition for taxation of costs need not be personal.

*Secus* the order for payment of the costs.

A PETITION was presented for taxation of a bill. The result was in favour of the respondent, a small fraction only being taxed off, and a balance found due to him. This was a petition to dismiss the former petition for taxation with costs. The respondents did not appear, but an affidavit of service, not personal, was in Court.

*Per Curiam* : — The service of this petition need not be personal; but the order to pay the costs must be personally served, before the party can be brought into contempt.



*Ex parte* BURN. — In the matter of ISAACS.

C. of R.  
Nov. 6,  
1835.

**THIS** was a petition to stay the certificate.

Mr. *Twiss* and Mr. *Ayrton* took a preliminary objection that this was a petition by *Burn* and two others, stating themselves to be “three of the assignees”—that the attestation as to two of the petitioners was bad, and consequently this became the petition of one assignee only, and then that the others must be served; *ex parte Harris* (a), *ex parte Morgan* (b), which had not been done.

The Court overruled the objection; this not being the petition of the assignees.

Mr. *Twiss* and Mr. *Ayrton* : — If not the petition of the assignees, another preliminary objection arises; which is, that the petitioners do not state themselves to be creditors, which is necessary, 6 Geo. 4, c. 16, sect. 122; *ex parte Cutten*. (c) [Sir *G. Rose* : — *Burn* is stated to be the petitioning creditor, and to deny that he is a creditor is to cut the fiat under which the bankrupt claims his certificate from under his feet.] The bankrupt is not driven to deny that *Burn* is a creditor, as it is submitted that a petition to stay a certificate is bad, unless it contain an allegation that the petitioner is a creditor.

If there be four assignees, and a petition to stay the certificate be presented by three, stating themselves to be “three of the assignees,” but the attestation is bad as to two, the petition may be heard as the petition of the one.

That the bankrupt has not given up some of his property is no ground to stay the certificate.

An allegation that the bankrupt has not fully disclosed his estate is not sufficient, in ordinary cases, to stay the certificate. In extreme cases the Court would order first an issue.

If a fiat be worked before one commissioner, and in his absence from London in vacation the certificate be signed by another commissioner who acts for the absent commissioner, the Court will refer the certificate back to be signed by the commis-

(a) *Ex parte Harris*, 2 Dea. Ch. 4.

(b) *Ex parte Morgan*, Buck. 109.

(c) *Ex parte Cutten*, Buck. 69. See also *ex parte Flint*, Mont. &

Bli. 515, where it was held that on a petition to supersede, the petitioner must state he was a creditor, not only when the commission issued, but also at the time of presenting his petition.

sioner who had been absent. See a note on this in the Appendix.



1835.

The Court overruled the objection.

*Ex parte*  
BURN.In the matter  
of  
ISAACS.Mr. *Swanston* *contra*.

*Per Curiam*: — This petition states that the bankrupt has not given up some of his property; that is no ground for staying the certificate if he has disclosed it. But the petition states that the fiat was worked by Mr. Commissioner *Williams*; but that he being out of town when the certificate was ready for signature by the commissioner, it was carried before, and signed by Mr. Commissioner *Merrivale*. Now the Court will not pass a certificate so certified; it must be referred back to Mr. Commissioner *Williams* to certify. The petition contains many allegations of want of disclosure of his estate by the bankrupt, but that is not sufficient in ordinary cases, to stay the certificate; and even in the most extreme case the Court would not stay without ordering an issue.

Referred back to Mr. Commissioner *Williams*.

C. of R.  
Nov. 6,  
1835.

If an official assignee become insolvent, the creditor's assignees will have leave to sue in the names of the registrars on the bond given by the sureties.

*Ex parte* TOPHAM. — In the matter of BATH.

THIS was a petition against the sureties of one of the official assignees presented by the creditors assignee.

In May 1832 *Bath* was declared bankrupt, and *Joseph Lowe* appointed official assignee. Various sums were paid to *Lowe* on account of the bankrupt's estate.

In January 1833 *Lowe* became insolvent, and was removed from his appointment as official assignee. *Lowe* shortly after died in the King's Bench prison insolvent.



In February 1835 an audit meeting took place, and a balance of 55*l.* 8*s.* was then found due to the bankrupt's estate from *Lowe*.

1835.

*Ex parte*  
TOPHAM.

In the matter  
of  
BATH.

*G. Rennie, M. Rennie, D. Bevon, I. T. Toxen, H. Halgood, and R. Playfair* were the sureties for *Lowe* in the bond which by virtue of the order of the Court of Review was executed by them and *Lowe* to Serjeant *Lawes* and *William Barber, Esq.*, the chief registrars of the Court of Review.

Applications had been made by the chief registrar to the sureties for payment of the balance of 55*l.* 8*s.* which they had not paid. The petition prayed that the sureties might be at liberty to pay to *Groom*, the official assignee of the bankrupt's estate, the 55*l.* 8*s.*, together with the petitioner's costs of and incidental to this application, or that the chief registrars (the petitioner executing to them a proper indemnity) do forthwith assign to the petitioner the bond executed to them by *Lowe* and the sureties, to enable the petitioner to put the same in force to recover the 55*l.* 8*s.*, or that the petitioner might be permitted to sue upon the bond in the names of the chief registrars, upon executing to them such indemnity as aforesaid, or that the chief registrars might be ordered to put such bond in force for enforcing payment of such balance.

Mr. *Keene* for the petition.

Mr. *J. Russell* for the sureties.

*Per Curiam* : — Take an order that the petitioner may use the names of the chief registrars (giving them an indemnity) in suing on the bond given to the chief registrars.



C. of R.  
Nov. 6 & 24.  
1835.

*Ex parte* PERRING.—In the matter of  
CAMPBELL.

The certificate will not be stayed on a petition alleging information and belief, though supported by an affidavit swearing to the fact positively. Sir J. Cross, diss.

The certificate will be stayed to enable a creditor to prove, when the reason for his not proving was a belief that no dividend would be paid.

**THIS** was the petition of *John Perring*, praying that the allowance of the bankrupt's certificate might be stayed, the petitioner undertaking to prove if the Court should so require.

The petitioner, after stating that he was a creditor, and that he had not proved, as believing no dividend would be paid, proceeded as follows:—“That your petitioner having had information that the said bankrupt had lost various sums of money at play, your petitioner made inquiries upon the subject, when your petitioner was informed, by one *W. Watson* of No. 4, Caroline Place, Hampstead Road, on the 18th day of August instant, that the said bankrupt had, in the early part of February last, lost by gaming in one day 20*l.* and upwards; namely, that he, in the month of February last, lost the sum of 130*l.* by gaming in one day at *rouge et noir*.”

The affidavit in support, sworn by the petitioner, was in the same words, with the addition, “which information he this deponent believes to be true.” A Mr. *Watson* also made the following affidavit in support of the petition:—“That he knew and had been well acquainted with the bankrupt for four years; that on Friday or Saturday, about the early part of February last, about two o'clock, deponent went to No. 3, Pickering Place, St. James's Street, then kept, as deponent believed, by a person named *Romeo*, as a common gaming house, and that he then saw the bankrupt in a room in the first floor playing at *rouge et noir*, and that the bankrupt staked sums from 5*l.* to 6*l.* on the game with various success; that the bankrupt left the



room about half past two, and the deponent continued in the room till seven o'clock in the evening of the same day; that about half past four in the afternoon of the same day the bankrupt again came into the room and began playing at *rouge et noir*, first staking 5*l.* upon the said game, which having lost, he gave a bank note of 100*l.* to a person at the table to get him change, who in a few minutes returned and gave bankrupt several bank notes, and about twenty sovereigns in gold; that the bankrupt then commenced playing for 10*l.* the game, and afterwards for 15*l.* and 20*l.* the game, and lost every stake he then played; that the bankrupt on that one day lost the whole of the 100*l.* at *rouge et noir*, and remained in the room till about half past six in the evening, when he left; that before he left the room he exclaimed, in the presence of deponent, 'D—n the game, I will never come into the room any more, for I have lost 130*l.*' "

1835.

—  
*Ex parte*  
PEBBING.  
In the matter  
of  
CAMPELL

Mr. *J. Russell* for the petition.

Mr. *Swanston* and Mr. *Keene*, *contra* : — This petition states, that the petitioner was "informed" that the bankrupt had lost, &c.; and the affidavit in support by the petitioner echoes this. It is true that, in an affidavit filed by *Watson*, the fact is sworn to positively. But to stay a certificate for gaming, the fact must be positively stated on the petition. If that be not done, even an uncontradicted allegation, "that the bankrupt had admitted he had lost 25*l.* at one sitting," is not sufficient; *ex parte Crouch*. (a) [Sir *J. Cross* : — There was no other evidence in that case; here there is. Sir *G. Rose* :

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(a) *Ex parte Crouch*, 3 *Dea. & Ch.* 17.



1835.

—  
*Ex parte*  
 PERRING.  
 In the matter  
 of  
 CAMPBELL.

—If the decision had been on that ground only, it would be very strong.] If a bill in equity were filed to establish heirship, it would not be sufficient to allege that the plaintiff had been informed and believed that he was heir. Even if the bill were not demurred to, with what evidence could he support his bill? Why, that he had been “informed;” he could not bring evidence in support of the fact that he actually was heir, as that was not stated on the bill.

Mr. *Russell*, in reply, was stopped by the Court.

The CHIEF JUDGE:—It appears to me that the facts are not charged in the petition with sufficient precision, and I have always understood that on a petition to stay a certificate the facts should be positively stated; but the majority of the Court are of opinion that the petition, together with the affidavit of *Watson*, are sufficient; consequently the objection fails, and this case must proceed.

Sir *John Cross*:—When I first took my seat in this Court, I had an idea that petitions should be drawn with great precision, and could not be amended; but I immediately discovered such not to be the case. At common law the record may be amended—at *Nisi Prius*; so in this case, if the form of the petition were bad, I should think it might be amended *instantly*; for though it may be a general rule that a petition to stay a certificate cannot be amended, yet that rule, being one of practice only, is not inflexible. It is a mere technical objection; and if so, was not taken technically in due time, as Mr. *Swanston* did not state it the very first thing when he rose to open his case; whereas it is a preliminary objection,—a demurrer to the opening. The certificate should be stayed.



*Sir George Rose* : — The allegation in this petition is only just enough to let in the evidence, but it is sufficient. Allegations in petitions need not be as precise as pleadings at common law. “Information and belief” is unquestionably enough in the petition, whatever may be necessary in the affidavit in support. “Information and belief” in the affidavit is not enough to stay a certificate.

1835.

—  
*Ex parte*  
PERRING.  
In the matter  
of  
CAMPBELL.

A question then arose whether an affidavit in reply, filed this day, could be read.

*Per Curiam* : — Read the affidavit, and, if necessary, the petition shall stand over to have it answered.

The CHIEF JUDGE : — The allegation in the petition is general, and the bankrupt answers generally : but then the facts are more detailed in the affidavit in support ; and if the bankrupt had made as precise a denial as *Watson* has made precise charges, we would have some further inquiry ; but if the bankrupt will file evasive affidavits, his certificate will not be allowed.

*Sir John Cross* : — The bankrupt does not deny with sufficient precision. If a bankrupt loses 20*l.* in one day his certificate is stayed, though he wins back that and more. The affidavit of *Watson* is not contradicted.

The order this day made was : — Certificate stayed, petitioner undertaking to stay an action commenced by him, and not to commence any other, and to be at liberty to prove.

This day the petition was in the paper to be spoken to, Nov. 24*th.*



1835.

Mr. *Swanston* was about to address the Court, when

*Ex parte*  
PERRING.  
In the matter  
of  
CAMPBELL.

Sir *George Rose* said: — I now concur with the Chief Judge, that the allegation in the petition was not sufficient. I have indeed much doubt upon the subject, and the inclination of my own opinion still is, that the allegation is sufficient; but as the other Judges differ in opinion, I ought to incline the benefit of any doubt towards the side of mercy. But for that consideration I should agree with Sir *John Cross*.

*Per Curiam*: — The petition is dismissed, but the petitioner must have leave to prove, and assent or dissent from the certificate.

C. of R.  
Nov. 7,  
1835.

*Ex parte* BRADSTOCK. — In the matter of WILSON.

A reference to the commissioner to report whether a pecuniary arrangement by the assignees would be beneficial to the estate.

THIS was the petition of the assignees, praying that it might be referred to the commissioner to inquire and report, whether it would be beneficial to the estate that the contract entered into by the petitioners with *H. Clifford* for the sale of certain estates belonging to the bankrupt should be completed, and whether, with a view to the completion thereof, it would be for the benefit of the estate that 2,000*l.* should be paid out of the purchase money to *Ann Wilson* and her husband, as a consideration for their releasing their claim to the estates; and if the commissioner should be of opinion that the contract and arrangement were beneficial to the estate, then that the same might be confirmed and carried into effect by the Court. One third in value of the creditors had sanctioned the arrangement at a meeting called for the purpose.



Mr. *Swanston* and Mr. *Howard* for the petition.

1835.

Mr. *Ayrton* consented for *A. Wilson*.

*Ex parte*  
BRADSTOCK.  
In the matter  
of  
WILSON.

Sir *George Rose* : — These orders are *periculo petentis*, and would not protect the assignees against any dissentient creditors if the arrangement be not proper. (a)

Reference ordered.

In the matter of GERRISH.

MR. *WRIGHT*. A docket has been struck, but the time for opening has not yet elapsed; the petitioning creditor is unable to prove an act of bankruptcy before the docket: he can prove one since, and asks leave to strike a new docket.

C. of R.  
Nov. 7,  
1835.

The same creditor cannot strike another docket before the time for opening has expired.

*Per Curiam* : — The rule is not to allow a new docket to be struck till the time for opening has run out: that rule must be followed. Applications like this are often made, to hang up a fiat *in terrorem*.

Order refused. (b)

(a) As to the Court giving its sanction to such arrangements, see *ex parte Groom*, *Mont. & Bl.* 263; *ex parte Jeffery*, *id.*; *ex parte Goding*, 1 *Dea. & Ch.* 323; *ex parte Farmer*, *id.* 110; *ex parte Hurley*, 2 *Dea. & Ch.* 631; *ex parte James*, 3 *Dea. & Ch.* 290; *ex parte Williams*, 1 *Mont. & Ayr.* 689; *ex parte Prater*, 4 *Dea. & Ch.* 214; *ex parte De Begnis*, 1 *Mont. & Ayr.* 277; *ex parte Kirby*, 2 *Mont. & Ayr.* 142; *ex parte Hyslop*, 2 *Mont. & Ayr.* 289.

(b) See *ex parte Llewellyn*, 2 *Mont. & Ayr.* 298; and *ex parte Jones*, 2 *Mont. & Ayr.* 102.



C. of R.  
Nov. 7,  
1835.

Where an assignee purchases part of the estate without leave, the general rule is to remove him.

*Ex parte* ALEXANDER. — In the matter of HOBBS.

A FIAT issued against the bankrupt *Hobbs*, who was a livery stable keeper; and *Collins*, a horse dealer, and *Bovill*, were chosen assignees. *Collins* became the acting assignee. In August 1835 a sale by auction of the bankrupt's effects, consisting of horses, &c. took place. *Collins* attended at the sale, and bid, and became the purchaser of several lots, at prices, as the petition stated, considerably less than the value, and that they would have produced much more if *Collins* had conducted himself properly, and had not become a purchaser. The petition stated that *Collins* and several others agreed not to bid against each other; but to meet after the sale, and come to some agreement, &c., and that *Collins* gave to each of the persons who had come to such agreement several sums; and, as the petitioner believed, to each of them or some of them, 19s. 6d. a piece, or thereabouts, and also a further sum of 4s. 6d. a piece, or thereabouts, and also other similar sums to each person. (a) This was a petition by a creditor, praying that *Collins* might be removed from being assignee, and some proper person or persons chosen in his room, or in the room of him and also of *Bovill*; and that *Collins* might account for the estate of the bankrupt purchased by or for him, and how the same had been sold, and for what; and that *Collins* might pay over to the official assignee what should be found due in respect thereof, particularly in respect of any profit made on the re-sale by him of the several geldings mentioned; and that such of the geld-

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(a) This is in pursuance of the usual plan followed at what is called a *knock out*.



ings as should not have been resold might be resold, and if they should not on such re-sale sell for the prices equal to which *Collins* purchased them, then that he might be held to his purchase; and that *Collins* might pay the costs and expences of such re-sale and of the petition, and incidental thereto.

1835.

*Ex parte*  
ALEXANDER.  
In the matter  
of  
HOBBS.

Mr. *Bethell*, with whom was Mr. *Wright*, for the petition, after stating that the order made by Lord *Lyndhurst* in *ex parte Badcock* (a) had established the rule that an assignee who purchased part of the bankrupt's estate must be removed, was stopped by the Court.

Mr. *Twiss* for *Bovill*.

Mr. *Swanston* and Mr. *J. Russell* for *Collins*: — The assignee ought not to be removed, as there was no fraudulent intent, but we admit that there must be an inquiry, and an account of what gain *Collins* made in the transaction, which, if any, he must refund. In *ex parte Turville* (b) an assignee bought part of the estate, and a re-sale was ordered, but the assignee was not removed. As to the rule stated to have been laid down by Lord *Lyndhurst* in *ex parte Badcock, re Gundry* (a), the removal there was not treated of course; it was done after much consideration, and on the ground of a continued dealing. The present petitioner was present at the sale, knew what was going on, but did not object.

Mr. *Bethell*, in reply, was stopped by the Court.

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(a) *Ex parte Badcock*, in the matter of *Gundry, Mont. & Mac.* & Ch. 346.

(b) *Ex parte Turville*, 3 Dec.



1835.

The CHIEF JUDGE:—

*Ex parte*  
ALEXANDER.  
In the matter  
of  
HOBBS.

The general rule is, that where a person charges himself with the interests of others, he must not oppose his interest to theirs. Assignees are especially within this rule. When assignees wish to bid, and become purchasers of any part of the bankrupt's estate, they must be first removed. (a) Instances have occurred where assignees, who had purchased without a previous removal, have been allowed to remain assignees, a re-sale taking place; but those latter cases are exceptions to the general rule, which is that an assignee who purchases without previous permission will be removed. (b)

(a) See *ex parte Molineux*, ante, 245.

(b) *Qu.* As to the existence of this general rule?

In *ex parte Reynolds*, 5 *Ves.* 707, an assignee who bid, and his co-assignee who permitted the purchase, were both removed.

In *ex parte Lacey*, 6 *Ves.* 625, an assignee had purchased without leave; the property was re-sold, but the assignee was not removed; and the reporter, in a note, says other cases of the same nature occurred about the same time, namely, *ex parte Tanner*, *ex parte Attwood*, and *Owen v. Toulkes* received the same determination. In *ex parte James*, 8 *Ves.* 337, Lord Eldon said (see p. 348), assignees could not purchase unless they shook off the character altogether. In *ex parte Byam*, February 21, 1806, where a considerable time had elapsed, the Chancellor refused to order

a re-sale, the purchaser appearing, but directed an account; in this case there was no removal. In *ex parte Chadwicke*, November 1807, M.S., the Lord Chancellor said, "It is my decided clear opinion, that assignees cannot in any case purchase for their own interest; the rule, from the impossibility of the Court reaching the transaction, is imperative." In *ex parte Lewis*, 1 *Gl. & J.* 69, the assignee purchased, the estates were resold, but the assignee not removed. In *ex parte Badcock*, *Mont. & Mac.* 231, an assignee who purchased was ordered to account, and was removed. In the course of a case, heard before Lord Brougham in Lincoln's Inn Hall, (evening sitting, 26th August 1831, M.S.) his Lordship said, on *ex parte Badcock*, *Mont. & Mac.* 231, being quoted, "the language of *ex parte Reynolds*, 5 *Ves.* 707, and the order in *ex*



If assignees could calculate that there were any chances in their favour against removal, so that *perhaps* they might escape, the attempt would constantly be made. Therefore, in all such cases, and though there be no fraud, if any creditor applies and complains, the assignee must be removed. In this case nothing justifies the assignee, or takes him out of the general rule. The biddings here were more especially injurious, being by an assignee who himself understood horses; if he did not bid for some lots, other persons would refuse also, on the ground that as the assignee declined that horse, there must be something bad about it. My judgment is, that *Collins* must be removed, which is founded on the general rule, and the fact that he has not proved his case to be one of exception.

1835.

—  
*Ex parte*  
ALEXANDER.  
In the matter  
of  
HOBBS.

Sir John Cross :—*Collins* is guilty of a conspiracy and fraud to keep down the biddings. In one instance he suffered a horse to be knocked down to another for less than he would have given, and afterwards went to the purchaser and gave 19s. 6d. more for the very horse. *Collins* must be removed.

Sir George Rose :—The horses were bought by the assignee, and sold again at a profit, whether great or

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*parte Badcock*, would lead to the conclusion, that the mere purchase by an assignee is sufficient ground for removal. This is going too far; to be sure it throws the proof of a good motive upon the assignees to show why they did purchase." In *ex parte Turville*, 3 Dea. & Ch. 346, an assignee, who was also a mortgagee,

having purchased without leave, the estate was resold, but he was not removed.

See, as to obtaining previous leave to bid, *ex parte Thwaites*, 1 Mont. & Ayr. 323; *ex parte Beaumont*, 1 Mont. & Ayr. 304; *ex parte Page*, 4 Madd. 459; *ex parte Scrole*, 1 Gl. & J. 187.



1835.

*Ex parte*  
ALEXANDER.  
In the matter  
of  
HOBBS.

small is immaterial, and no offer or step was taken to account for the difference before this petition was presented. Assuming the sale was perfectly fair, and the result beneficial to the estate, yet it is inevitable that the assignee should account, and his removal also would be the rule, and his non-removal quite matter of favour. The rule as to removal is doubtless in the discretion of the Court, and has its exceptions. The admissions made by *Collins* in this case call on the Court not to relax the rule, though I do not think that any fraudulent intent can be imputed to him. The order of the Court must be, that *Collins* be removed, and account; but probably on an affidavit by him of the gain on the transaction, and payment thereof to the official assignee, the order will not be further enforced against him, as no property now remains. The petition as to *Bovill* is dismissed.

Ordered, that *Collins* be removed, and account, with costs. The petition dismissed as to *Bovill*, and with costs by the petitioner, if he did not appear by the same solicitor as *Collins*, when the costs may be set off.

C. of R.  
Nov. 12,  
1835.

Two estates were devised charged with legacies; the devisee mortgaged both, became bankrupt, and both were sold: the proceeds of one were sufficient to pay legacies and mortgage money; *secus* the other: held, the legacies should be paid out of the former alone.

*Ex parte* HARTLEY.—In the matter of TRISTRAM.

*ELLEN WILLIAMS*, by her will, dated the 13th of April 1805, devised all her messuages, lands, and hereditaments in Settle and Giggleswick unto *Tristram* (the bankrupt) and his heirs, and bequeathed certain legacies amounting to 2,030*l.*, and gave all the residue of her property to *Tristram*, his executors and administrators; and if her personal estate should fall short of paying

and if her personal estate should fall short of paying



the whole of her legacies, she charged her real estates therein-before devised to *Tristram* with the payment of such deficiency; and she appointed *Tristram*, *Richardson*, and *Birkbeck* executors. *Ellen Williams* died in 1826. In 1825 the petitioners and *John Hartley* (since deceased), by their next friend, filed a bill against *Tristram* and *John Airey*, executors appointed under the will of one *James Hartley* deceased, for an account of his estate. *Tristram*, by his answer, admitted he was indebted to the testator's estate in 2,535*l.* On the 12th of April 1826 it was ordered, that *Tristram* should pay that sum into court. He did not comply with the order, but applied that he might go before the Master, and propose security for the 2,535*l.* as the Master should approve, which was ordered. *Tristram* brought in before the Master a state of facts, stating he was seised in fee of a dwelling-house and land in Settle and Giggleswick, York; viz. a dwelling-house in Duke-street, Settle, and two pieces of pasture land called Gowdy Lands and Castle Bar Pasture; and he proposed to deposit the title deeds thereof in the Master's office, for securing the said sum, and to execute a legal mortgage when required. The state of facts and proposal did not state or notice any charges or incumbrances as affecting those premises. The Master reported that the title deeds were a sufficient security for the sum, and *Tristram* accordingly deposited the same in the Master's office. *Tristram*, under the devise contained in the will of *Ellen Williams*, became entitled to other hereditaments besides the lands called Gowdy and Castle Bar, and which, together with such lands, were charged as aforesaid with the legacies, and were in possession of *Tristram*.

In 1828 *Tristram* was desirous to mortgage the other hereditaments, and wrote to Mr. *Preston* as follows :—" Castlebar and Gowdy Lands, and my mother's

1835.

—  
*Ex parte*  
HARTLEY.  
In the matter  
of  
TRISTRAM.



1835. house are security for 2,500*l.* and interest to *James Hartley's* estate, the remainder of my Settle estate must now be subject to the legacies unpaid under my aunt's last will, now what sum can you raise me on this last property?" &c. In 1828, *Preston*, as solicitor for *Tristram*, borrowed 1,500*l.* upon mortgage to *Gilson* and *Batty* of the other hereditaments. The petition stated "that the intent and meaning of *Tristram* when he took in the proposal before the Master, and before and at the time when *Tristram* made the deposit, and when the master made his report, and when *Tristram* wrote the letter to *Preston*, was that the hereditaments other than the lands called Gowdy Lands and Castlebar should be exclusively charged with, and the fund to pay the unpaid legacies under *E. Williams' will.*"

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*Ex parte*  
 HARTLEY.  
 In the matter  
 of  
 TRISTRAM.

In December 1829 a commission issued against *Tristram*. In 1828 *Riddell* was appointed receiver by order of Chancery, and in July 1829 it was ordered that *Tristram* should within six weeks pay to *Riddell* the 2,500*l.* and execute a mortgage for the balance, that *Tristram* should execute all necessary conveyances to the purchasers.

Default was made in payment of the 2,500*l.* and the hereditaments were accordingly in January 1830 sold in four lots; and lot 1, being the house in Settle was sold for 200*l.*, and lot 2, being the lands called Gowdy Lands, was sold to *W. Birkbeck* for the sum of 1,300*l.*, and lots 3 and 4, being the lands of Castlebar, were sold to *W. Bolland Esquire* for 985*l.*, and 105*l.*

*Birkbeck* insisted upon having the unsatisfied legacies under *Ellen Williams' will* satisfied before he would complete his contract for purchase.

In Nov. 1831 the property mortgaged to *Gilson* and *Batty* was sold under the bankruptcy for 1,000*l.* more than sufficient to satisfy the last-mentioned mortgagees.



This was the petition of *James Hartley* and *Mary Hannah Hartley*, infants, by their next friend, praying that the produce of the sale of the property mortgaged to *Gilson* and *Batty*, which remained after satisfaction of such mortgage, might be declared subject to the payment of the unsatisfied legacies, and that an order might be made for payment to *Riddell* (the receiver) of such part of the produce of such sale remaining after satisfaction of the mortgage to *Gilson* and *Batty* as ought to be paid or made good in respect of the unsatisfied legacies and the interest thereof.

1835.

—  
*Ex parte*  
HARTLEY.  
In the matter  
of  
TRISTRAM.

*Mr. Bethell* and *Mr. E. Montagu* for the petition.

*Mr. Swanston* and *Mr. J. Russell*, *contrà* : — When the Court of Chancery accepted the bankrupt's interest in the estates, they were subject to the legacies, a fact which the Master must have known, as the abstract of title must have been before him. The occurrence of the bankruptcy creates a material difference; for assuming that the petitioners could, as against the bankrupt, and as against the legatees, have thrown the legacies on the other estate, yet they cannot do so against the assignees. This difference rests on the distinction between a lien on the property and a personal liability. In cases like the present the lien is personal, and is lost by the property passing into other hands. The assignment in bankruptcy is a conveyance for a valuable consideration, nevertheless the assignees take subject to any specific lien; but as there was no specific lien in this case, the moment the assignment took place to the assignee that lien became extinct.

*Mr. Bethell*, in reply : — The petitioners do not depend on any special contract, nor upon the covenant by the



1835.

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*Ex parte*  
 HARTLEY.  
 In the matter  
 of  
 TRISTRAM.

mortgagor. The lien of the petitioners on the estates is created by the mortgage made by the bankrupt. The bankrupt took the estate subject to a charge, to which another estate was also liable; and the petitioners, having a subsequent security, are entitled to have the charge partly provided for out of the other estate. All equities binding the bankrupt's estate bind the assignee of that estate.

The CHIEF JUDGE:—

This is not a question between the legatees and the petitioners, but between the assignees of the mortgagor and the mortgagees. At the bankruptcy of the mortgagor he possessed the equity of redemption of the premises in question, and he also possessed other premises under the will charged with some legacies unpaid at the bankruptcy. The mortgaged estate being sold, the assignees claimed that the unsatisfied legacies should be paid out of the purchase money of that sale.

The petitioners (the mortgagees), as the surplus then left would not pay their mortgage debt, insist that the legacies should be charged on the other estates, a charge which the estates are able to sustain.

If this were a question between an execution creditor, mortgagee, and assignee, and all the property of the bankrupt were seized under the execution, then *Robinson v. Tonge*, the case mentioned in *Aldrich v. Cooper (a)*, would enable the estate to cast the execution creditor on the unincumbered property. It has been so decided even on an extent in aid.

If, on the other hand, there had been a special con-

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(a) *Aldrich v. Cooper*, 8 Ves. 383.



tract by the mortgagee to bear part of the legacies, he must have abided by it; but the contract arises by deposit of a deed creating an equitable mortgage. I consider this case as if a legal mortgage had been executed. The legacies are charged by the will through which the bankrupt derives his title, and I am of opinion the petitioners may call on the legatees to take their legacies out of the estate not incumbered; or if they have already taken out of the petitioners estate, they may stand in the shoes of the legatees.

The bankruptcy makes no difference, as the assignees take subject to all equities which were good against the estate before the bankruptcy. The petitioners are entitled to have the monies arising from the sale applied to the legacies.

*Sir John Cross* : —

This question depends on this allegation in the petition, viz.—“That the intent and meaning of *Tristram*, when he took in the proposal before the master, and before and at the time when *Tristram* made the deposit, and when the master made his report, and when *Tristram* wrote the letter to *Preston*, was, that the hereditaments, other than the lands called Gowdy Lands and Castlebar, should be exclusively charged with, and the fund to pay the unpaid legacies under *E. Williams*’ will.” Was that the contract? This must be collected from the circumstances of the case, there being no express contract.

The facts are, the master was to be satisfied of the value of the deposit; that value would depend on the amount of incumbrances thereon; the bankrupt put in an affidavit of the value, and did not mention any thing about the incumbrances; the master must have perceived by the will that the legacies were charged

1835.

—  
*Ex parte*  
HARTLEY.  
In the matter  
of  
TRISTRAM.



1835.

—  
*Ex parte*  
 HARTLEY.

In the matter  
 of  
 TRISTRAM.

on the land, and he must have been convinced either that the legacies were satisfied, or if not, that they were charged on some other estate.

The bankrupt sent instructions for a second mortgage, stating that all the legacies were charged on the mortgage estates. Where is this mortgage deed? It probably states the very fact; he mortgages for value; and as to the legacies, when the estates are sold, there is enough to pay them and leave a surplus.

This convinces me that the allegation in the petition is true, and that he must have communicated his intent at the time of the deposit; and that he at that time intended the legacies to be charged solely on his remaining estate.

If the bankrupt had the power to transfer the charge to his remaining estate, he has exercised that power, and as against him, it is clear the petitioners are entitled to a charge on the settled estate.

Bankruptcy creates no difference; the assignees take subject to any equities binding the estate.

*Sir George Rose :—*

The case is not one which regularly would come before us; it would be more correctly tried in another Court. The petitioner, however, are wise in coming here, such being the shortest and cheapest course.

There is nothing in the arguments against the petition. The party having the entire interest, such interest is chargeable to realize all the interests of the legatees. The difficulty was, how far the acts of the parties would exclude them. It appeared that there was something in the intent of the parties, that the legacies should be thrown on particular property, and so forego what otherwise would have taken place; the only question is, how far the principle that the bank-



rupt's interest is to be carried to the utmost extent of satisfying the claims against it, is to be arrived at, and how far bankruptcy alters that. It is not a personal equity against the bankrupt; those who take by operation of law, as assignees, take subject to all equities which bound the estate: here the assignees are bound as the bankrupt would have been.

1835.

*Ex parte*  
HARTLEY.  
In the matter  
of  
TRISTRAM.

*Ex parte* STONE.—In the matter of WHITEHEAD.

C. of R.  
Nov. 25,  
1835.

A NOTICE of motion had been given for a former day, but abandoned.

Mr. *Swanston* now applied for the costs of the abandoned motion; he stated he had not an affidavit of service of the motion on the day for which notice was given, but that he now had, which was sufficient in equity.

On an abandoned notice of a motion, the application for costs and affidavit of service may be on a future day.

*Per Curiam*: —The Court will follow the practice in equity.

Costs ordered.







# CASES

## IN

# BANKRUPTCY.

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*Ex parte* THOMPSON. — In the matter of WYATT and THOMPSON.

*Ex parte* CATER. — In the matter of WYATT and THOMPSON.

C. of R.  
May 5,  
July 21,  
Dec. 22,  
1835.  
Jan. 12,  
1836.

*EDMUND BARBER* in 1808 devised all his real and personal estates to trustees, in trust to pay the rents and interest to his daughter for life, remainder to her children. This daughter was also entitled to other property under the will of her grandfather. In 1808 she married *Thompson* (the bankrupt). No settlement was made on the marriage, of which there were eleven children. In 1831 a joint commission issued against *Thompson* and *Wyatt*. At the bankruptcy much of the wife's property had been disposed of in various ways. What remained, and continued vested in the names of the trustees, consisted of 2,967*l.* three per cent. consols, the annual dividends on which were 89*l.*, and of some of the estates devised by her father, whose annual rental was 158*l.* (subject to deductions for taxes, &c.), the annual net produce of all of which (after deductions for taxes) was 225*l.* The wife also claimed

The Court can order the wife an allowance out of real estates.  
A reference may be made to the registrar to report as to amount.  
The Court can itself decide the amount.  
The whole income is not to be given.  
200*l.* out of 247*l.*, or 175*l.* out of 225*l.*, is a fair allowance.  
Order made from date of fiat.



1835.

*Ex parte*  
**THOMPSON**  
 and  
*ex parte*  
**CATER.**  
 In the matter  
 of  
**WYATT**  
 and another:  
*May 5,*  
 1835.

5,000*l.* under a suit in equity arising out of the sale of certain of her estates; but it appeared doubtful whether this claim would be successful. She further claimed dower out of all her husband's real estates sold by the assignees, and had received 50*l.* to release her dower in one estate.

On the 5th of May 1835 the wife presented a petition, praying for an allowance out of the estates of which her husband was possessed in her right.

Mr. *Swanston* appeared for the petition, and stated that the trustees would act under the order of the Court.

Mr. *Stephens*, for the assignees, contended that there ought to be a reference to an officer of the Court to certify the amount of the estates of which the husband was seised in right of his wife, and that the trustees must be before the Court.

The order made by the Court was:—On the trustees appearing and consenting, let the usual reference be made to Mr. *Gregg*, to ascertain what property the bankrupt was entitled to at the bankruptcy in right of his wife, and to approve of a proper settlement to be made on the wife.

Mr. *Gregg* made his report, certifying at length the amount of property to which the bankrupt was entitled at his bankruptcy, and that it was alleged the wife was wholly without the means of supporting her numerous family, and that the dividends of the 2,967*l.* consols (amounting to 89*l.*), and the annual rents of the real estate, amounting to 158*l.*, (subject to deductions,) ought all to be settled on her to her separate use, without anticipation, during her life.



The wife presented a petition to confirm this report. The assignees presented a cross petition, praying that the report might not be confirmed. (a)

Mr. *Swanston*, in support of the wife's petition, was stopped by the Court,

Mr. *J. Russell* and Mr. *Stephens*, *contra*, contended the Court had no jurisdiction to make the order, but that if there existed jurisdiction yet the order went too far; that the assignees had been in possession of the rents and profits ever since the bankruptcy, which therefore should not be included in the order. The wife is entitled to a proportion only,—not to the whole of the property; *Burdon v. Deane* (b); *Beresford v. Hobson* (c); *Jacob v. Morley* (d). The assignees therefore object to the amount of the allowance, and submit that a moiety of the whole would be sufficient to give the wife.

Mr. *N. Ellison*, for the trustees, submitted to the order of the Court.

*Per Curiam* :—Reduce the amount to 200*l.*; that is, take the 89*l.*, the annual dividends of the stock, and take 111*l.* from the rents and profits of the estate, making together 200*l.*, costs of both parties of the former petition, of this reference, and of this application,

1835.

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*Ex parte*  
THOMPSON  
and  
*ex parte*  
CATER.  
In the matter  
of  
WYATT  
and another.  
July 21,  
1835.

(a) It was observed by the Court, that, in strictness, the assignees ought to have presented a petition of exceptions to the report; but the point was waived, and the matter argued as if the assignees had excepted to the report.

(b) *Burdon v. Deane*, 2 *Ves.* jun. 607.

(c) *Beresford v. Hobson*, 1 *Madd.* 362.

(d) *Jacob v. Morley*, 1 *Atk.* 192.



1835.

—  
*Ex parte*  
 THOMPSON  
 and  
*ex parte*  
 CATER.

In the matter  
 of  
 WYATT  
 and another.

Dec. 22  
 & 23,  
 1835.  
 Jan. 12,  
 1836.

out of the surplus rents; and let the order be from the date of the bankruptcy.

The assignees presented a petition of re-hearing, stating, that the net annual produce of the rents of the real estates, after payment of the taxes and other outgoings, was only 135*l.*; so that the whole net produce of that and of the consols amounted to 225*l.* per annum only. The petition also objected, the Court had no jurisdiction to make the order, which could only be on bill in equity; that if it had jurisdiction, yet no such allowance could be made out of real estate; that the allowance of 200*l.* per annum was excessive; and that part of the sum ordered to be paid the wife for arrears of her allowance since the bankruptcy consisted of interest and rents received by the assignees since the bankruptcy.

Mr. *J. Russell* and Mr. *Stephens* for the assignees: —

A wife has no equity to any allowance out of real estates, *Burdon v. Deane* (a); and in *Stanton v. Hall* (b) it was decided that the wife had no equity to any allowance out of an annuity charged on real estates; and it has been held that a purchase made by a man in the joint names of himself and his wife, is void as against the creditors, as being within the statute of frauds, *Glaister v. Hewer* (c); and in *Macawley v. Phillips* (d) it was held, the husband was entitled to the income of his wife's equitable interest, unless he received some

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(a) *Burdon v. Deane*, 2 *Ves.* See *Walker v. Burrows*, 1 *Atk.* jun. 609. 93; *Crisp v. Pratt*, *Cro. Car.* 548;

(b) *Stanton v. Hall*, 2 *Russ. & Myl.* 175. *Lilly v. Osborn*, 3 *P. Wms.* 298; *Tucker v. Cook*, *Style*, 288.

(c) *Glaister v. Hewer*, 8 *Ves.* 195; 9 *Ves.* 12; 11 *Ves.* 377. (d) *Macawley v. Phillips*, 4 *Ves.* 15.



fortune with her, or had run away with a ward of Court. If the Court should be of opinion that the wife is entitled to a settlement out of real estates, yet she is not entitled to the whole value. It is true that the whole was given in *ex parte Coysagame* (a), and in *Vandenanker v. Desborough* (b); but those cases are disapproved of in *Wright v. Morley* (c), which is followed by *Beresford v. Hobson*. (d)

1836.  
—  
*Ex parte*  
THOMPSON  
and  
*ex parte*  
CATER.  
In the matter  
of  
WYATT  
and another.

There is a distinction between a settlement out of the principal, and one out of a life interest.

The wife's claim here is to the interest, for that her husband, being bankrupt, is unable to maintain her; but though she is at present entitled to the rents, yet if her husband hereafter obtain his certificate, and be able to maintain her, the assignees would then become entitled to take her interest. If the wife is otherwise provided for, she is not entitled to this equity; *Aquilar v. Aquilar*. (e) Therefore the order ought to be so qualified as to give the assignees right to reclaim the interest, if the bankrupt ever become capable of supporting his wife.

Mr. N. Ellison appeared for the trustees, and submitted to the order of the Court.

Sir G. Rose: — If that ever occurs, apply again to the Court. The difficulty is, how to carry into effect

(a) *Ex parte Coysagame*, 1 Atk. 192. 4 Bro. C.C. 139; *Oswell v. Probert*, 2 Ves. jun. 680; *Burdon v.*

(b) *Vandenanker v. Desborough*, 2 Vern. 96. Deane, 2 Ves. jun. 607; *Brown v. Clarke*, 3 Ves. 166; and *Lumb*

(c) *Wright v. Morley*, 11 Ves. 21. *v. Milnes*, 5 Ves. 517.

(d) *Beresford v. Hobson*, 1 Mad. 414. (e) *Aquilar v. Aquilar*, 5 Mad.

362. And see *Pryor v. Hill*,



1836.

—  
*Ex parte*  
 THOMPSON  
 and  
*ex parte*  
 CATER.  
 In the matter  
 of  
 WYATT  
 and another.

the desire of the Court to accomplish that which is best for the wife. It appears to me questionable whether the reference to Mr. *Gregg* should ever have been made; and it also appears to me that he has not made the correct report. If the assignees cannot obtain possession of the property without coming to equity, this Court can impose equitable terms. What Mr. *Stephens* says is entitled to consideration; but as to this being real property, I do not perceive that creates any distinction, though it possibly may. Speaking with the greatest respect, I must say Mr. *Gregg* has not executed the order properly. The order speaks of “a proportion.” I am not aware whether that is the usual order in equity. The right course was, to send it back to Mr. *Gregg* to reconsider his report as to the quantum. This Court, however, took on itself to execute that part of the order. No particular proportion has ever been fixed upon. The usual guide to the Court is, what would the creditors benevolently wish to be given? Therefore the subject of reference to Mr. *Gregg* was correct; and though perhaps more has been given to the wife in this instance than is strictly justifiable, yet I am at present unwilling, under the circumstances, to disturb the report. Then as to the rents: the assignees declare they received them as assignees; if so, they took as trustees with knowledge of the trust,—not as trustees receiving under a strict legal right. Therefore giving the bygone rents was perfectly correct as against trustees; but we must not leave the assignees in any difficulty.

The CHIEF JUDGE:—My difficulty is as to the amount of the allowance made to the wife. The Court would not have given 200*l.* if apprized that the net proceeds were but 225*l.* But as to the general prin-



ciples of law on which the judgment of the Court was founded, my opinion remains unshaken. The husband must himself have come to equity, and it has over and over again been decided that the assignees of a bankrupt take his property subject to all the equities to which it was liable in the hands of the bankrupt. Then what right would the wife have against the husband, he applying to equity? Here, it is true, the wife applies; yet the assignees being officers of the Court, we have the same power over them as if they themselves applied. That this is real property is not a sound objection. There is no principle on which to found any distinction between realty and personalty; the same equity attaches to both; and there is no case where the contrary is established, though there is a report where the Master of the Rolls doubted whether it had ever been done; but it was done in *Griffith's case* (a); and in some of the cases where it has been refused the refusal was not on account of its being realty. There is no authority, therefore, to show that our judgment is incorrect. I should however wish the amount reduced.

*Sir John Cross* : — This Court can enforce the equity asked only while it has the funds in Court. As to amount, it is difficult to draw the line, as it formerly was as to illusory appointments. Still I wish to follow *Wright v. Morley* (b), and not give the whole to the wife. The Court went rather too far in adopting the suggestion of the Registrar.

*Per Curiam* : — Originally *Gregg* gave the whole sum, which the Court reduce to 200*l*. Must not the matter be referred back to Mr. *Gregg*?

1836.

*Ex parte*  
THOMPSON  
and  
*ex parte*  
CATER.  
In the matter  
of  
WYATT  
and another.

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(a) *Griffith's case*, *Skin.* 110. (b) *Wright v. Morley*, 11 *Ves.* 21.



1836.

*Ex parte*  
THOMPSON  
and  
*ex parte*  
CATER.  
In the matter  
of  
WYATT  
and another.

Mr. *Swanston* : — Not here ; because, as the facts of the case are clearly before the Court, it can itself act.

Mr. *Swanston* and Mr. *Bethell*, *contra*, declined addressing the Court.

Mr. *J. Russell* : — As the counsel for the respondents decline to address the Court, they adopt the suggestions of the Court as their speeches, and I therefore have a right to reply.

*Per Curiam* : — This is a peculiar case. Had it not better be settled by arrangement ? Reduce the sum to 175*l*.

Mr. *N. Ellison*, for the trustees, applied for costs.

*Per Curiam* : — Let the amount of allowance be reduced to 175*l* ; the costs of the trustees out of the fund in the first instance ; Mrs. *Thompson*'s costs out of the fund also ; costs of the assignees out of the estate.

C. of R.  
Jan. 13,  
1836.

A reference for  
scandal is on  
motion of  
course.

*Ex parte* GOMM. — In the matter of GOMM.

MR. O. *ANDERDON* asked to refer an affidavit for scandal, and that the Court would answer the petition *instante*.

*Per Curiam* : — There is no necessity for a petition to refer for scandal ; it is a motion of course.



*Ex parte* HALL. — In the matter of HALL.

C. of R.  
Jan. 13,  
1836.

**T**HIS was a petition by the bankrupt for an assignment of the bond, the fiat having been annulled for want of a good petitioning creditor's debt.

The Court will not order the bond to be assigned, without evidence of the amount of damage.

In this case a reference was ordered to ascertain that point.

Mr. *Swanston* and Mr. *Dixon* for the petition: — This is an application under 6 Geo. 4. c. 16. s. 13., which enacts that the petitioning creditor shall give bond to the Lord Chancellor in the penalty of 200*l.*, to be conditioned for proving his or their debt or debts, &c., and also for proving the party to have committed an act of bankruptcy, &c., and to proceed on such commission; but if such debt or debts shall not be really due, or if, after such commission taken out, it be not proved that the party had committed an act of bankruptcy at the time of issuing the commission, and it shall also appear that such commission was taken out fraudulently or maliciously, the Lord Chancellor shall and may, upon petition of the party or parties against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him or them for the damages by him or them sustained, and for the better recovery thereof may assign such bond or bonds to the party or parties so petitioning, who may sue for the same in his or their name or names. [Sir *J. Cross*: — The Court cannot assign the bond till informed of the amount of the damage. The CHIEF JUDGE: — The act speaks of malice being added to the want of the requisites.] It has never been the practice to call on the parties to prove the amount of damage to the Great Seal. The petitioner proves malice, and the want of the requisites, whereon the assignment is of course; *ex*



1836.

—  
*Ex parte*  
 HALL.  
 In the matter  
 of  
 HALL.

*parte Kirshaw, ex parte Stephens.* (a) [Sir G. Rose: — Those cases were before 6 Geo. 4. c. 16. s. 13. The act then in force, 5 Geo. 2. c. 30. s. 23., uses the words “party grieved.”] It is submitted that “party grieved” and “bankrupt” have the same meaning. [Sir G. Rose: — Yes; there is a decision to that effect. The CHIEF JUDGE: — Lord *Henley* says, the word “bankrupt” was inserted to obviate doubts in *Smithy v. Edmonson*, 3 *East*, 302.] The assignee of the bond brings an action thereon, under which it is the peculiar province of the jury to assess the damages. If any proof as to damage is requisite here, it rather lies on the other side to prove that the damage does not amount to 200*l*. The jurisdiction of this Court is a compound of punishment and recompense. By the words of the 13th section the Court is to “examine the same;” that is, the same “fraud” or “malice,” “and order satisfaction,” — not examine the amount of satisfaction; and then is to assign the bond for better recovery thereof, which latter words would be useless if the Court had already settled the amount. Why send the parties to law, if the amount of damages is settled by the Court? Why may not the Court order the damages to be paid at once? Besides which, it is decided, that on an assignment of the bond, neither more nor less than the penalty can be recovered. In *ex parte Lane* (b) the Lord Chancellor says, “If I assign the bond, I not only decide that there was a malicious motive, but I cannot measure the damages; the petitioner must have the 200*l*; he cannot have more or less.” And his Lordship refers to the cases at law deciding the same point (c); and in *ex parte*

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(a) *Ex parte Kirshaw, ex parte Stephens*, 6 *Ves.* 2. Rep. 300; *Smithy v. Edmonson*, 3 *East*, 22; *ex parte Gaynor*,

(b) *Ex parte Lane*, 11 *Ves.* 415. 1 *Atk.* 144.

(c) *Smith v. Broomhead*, 7 *Ter.*



*Rimene* (a) the Chancellor confirms that doctrine, and, to avoid the difficulty, ordered 30*l.* to be paid, and the bond to stand as security.

Mr. *Bethell*, *contra*, was stopped by the Court.

The CHIEF JUDGE:—

The object of the 13th section of 6 Geo. 4. c. 16. was to give compensation for the injury done; not to impose a specific penalty of neither more nor less than 200*l.* The Court is not bound to assign the bond, but may either itself assess the damage, and then assign the bond limiting the amount to be recovered thereunder, or may order any amount of remuneration independently of the bond. Here the party states no facts enabling the Court to assess the damages, therefore there must be a reference to one of the deputy registrars to ascertain the amount of damage. This Court has already exercised its jurisdiction of assessing the damages in *re Clarke* (b), where the amount was limited to 28*l.*, and the bond ordered to stand as security for that sum. In *ex parte Gayter* (c) Lord *Hardwicke* said, “It was in the breast of the Court, where the bankruptcy was a doubtful case, and the commission superseded, either to direct an inquiry before a master of the damages sustained by the bankrupt, or,” &c. And in *Smith v. Broomhead* (d) Lord *Kenyon*, after citing this dictum of Lord *Hardwicke*’s, says, “Now that is weighty authority; and according to that the Lord Chancellor may either assess the damages, or enable the plaintiff to recover the whole penalty of the bond.” In *Smithy v. Edmonson* (e) Lord

1836.

—  
*Ex parte*  
HALL.

In the matter  
of  
HALL.

(a) *Ex parte Rimene*, 14 *Ves.*  
600.

(d) *Smith v. Broomhead*, 7 *Ter.*  
Rep. 505.

(b) Court of Review, 1832.

(e) *Smithy v. Edmonson*, 3

(c) *Ex parte Gayter*, 1 *Alk. East*, 32.

144.



1836.

—  
*Ex parte*  
HALL.  
In the matter  
of  
HALL.

*Ellenborough* says, "It is equally clear that the Lord Chancellor may *proprio vigore* ascertain the amount of the damages sustained by the party grieved, without any suit instituted for that purpose, or the intervention of a jury; and for recovery thereof he is authorized to assign the bond of the petitioning creditor; the reason of which was, that the order of the Lord Chancellor upon the party to pay the damage so sustained would only attach upon his person, and not upon his estate; and therefore, in case of contumacy, it was thought expedient to have effectual means of enforcing such order, by giving a remedy at law which would bind his property."

This fiat has been annulled for want of a petitioning creditor's debt, and the Court are satisfied that fraud and malice are proved to have existed. The alleged bankrupt entered into a composition, to which the petitioning creditor was a party, and under which he was paid his share; but then he stated a new promise on the part of the alleged bankrupt to pay the remainder of the debt in full, and stated that he had a promissory note as security for that amount from the alleged bankrupt, being the joint note of himself and his father. On production of the note, the Court saw that it was not the note of the bankrupt, but of his father, and the Court are convinced that the petitioning creditor knew this to be the case. The fraud and malice being thus established, it enables either the Lord Chancellor or this Court to assign the bond; or this Court may declare the party entitled to an assignment of the bond, and refer to the Lord Chancellor to assign if he thought fit.

But it has been contended, that if fraud or malice is established that it is the duty of the Court at once to assign the bond generally. If it had been so decided I should have been astonished, and might probably have



been bound by the decision; but it has not been so held. Then the words of the act are, "examine into the same." This positively directs an examination, which is to be followed by an "order" of "satisfaction," "and for better recovery thereof" an assignment of the bond. It is clear the object of the act was to give power to assess damages, and to assign the bond as a more easy means for the recovery thereof. The cases I have already cited coincide with the words of the act, and establish that the Court may either assign the bond generally, or order any less sum.

Here no proof is before the Court of the amount of the damage; and the circumstances of the case do not satisfy me that the party has sustained damage to the full amount of the bond. The petitioner not having given us the means of deciding as to the amount, we must have it ascertained either by a further examination here, by a reference, or by an issue.

The Court adopts the least expensive of these methods,—a reference to Mr. *Gregg* to report what is the amount of damage; this report, of course, would be open to exception if the parties are dissatisfied. The report being made, it may be enforced either by the process of this Court, or by an assignment of the bond.

*Sir John Cross* : —

The words of the act call on the Court to inform itself of the amount of damage. We cannot jump over all the previous words of the clause. Why ask an assignment, and then go to another Court to sue, when that end may at once be gained in this Court?

Now the question is, whether, under the words of the statute, this Court can and ought to assign the bond. This Court, under section 13, can assess and order damages independently of the bond. If we can assign

1836.

—  
*Ex parte*  
HALL.

In the matter  
of  
HALL.



1836.

—  
*Ex parte*  
 HALL.

In the matter  
 of  
 HALL.

the bond, I think we are now bound to decide “with as little delay (a)” as possible. But can this Court assign the bond? Perhaps it is the only thing we cannot do. The bond is given to the Great Seal. It is said we can recommend the Lord Chancellor to assign the bond; but recommendation to a superior Court is not discharging any judicial function. If we recommend only, the parties must go to another Court to have that recommendation carried into effect, and enforce the judgment of this Court; but I think this Court ought only to give such judgments as it can itself enforce. I am of opinion we ought now to decide, if there is sufficient evidence before the Court; if not, the petition ought to stand over for further evidence, either in the shape of affidavits or *vivá voce*; but I think the matter ought not to be referred to Mr. *Gregg*, unless by agreement of the parties.

Sir *George Rose*: — This Court cannot call on the Lord Chancellor to adopt our order to assign the bond generally, unless satisfied that damages to the amount of 200*l.* have accrued. We must also have evidence of malice; for suspicion of malice, or a tendency towards malice, is not sufficient. I concur with the view the Chief Judge takes of the law of this case. This question does not come on in the ordinary manner; the assignment of the bond being usually part of the petition to supersede or annul, when all the circumstances are before the Court; this petition, however, is after the annulling; but that creates no distinction as to the jurisdiction of this Court. When an order to annul is made here, it is merely a recommendation to the Chancellor; it was the same as to certificates till they came

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(a) 1 & 2 W. 4. c. 56. sect. 1.



to be addressed to this Court; it is still the same as to assignment of the bond. It was the same in the Vice Chancellor's court; he heard the cause, and intimated to the Chancellor what order should be made. If the parties were now prepared with evidence, and wished this Court to hear it, that would be of course; the reference to the officer is merely for the convenience of the parties and of the public.

1836.

—  
*Ex parte*  
HALL.  
In the matter  
of  
HALL.

The petitioner undertaking to abide by the order of the Court, refer it to Mr. *Gregg* to ascertain the amount of damage, and let the bond stand as security for the amount.

Mr. *Swanston* asked for the costs in this matter.

*Per Curiam*: — If they are “damages” Mr. *Gregg* will allow them; if not, this Court cannot order him so to do.

*Ex parte* VANHEYTHUSEN. — In the matter of  
PHIBBS.

C. of R.  
Jan. 13,  
1836.

THIS was the petition of *Vanheythusen*. The petition stated, that in and previous to 1830 *Phibbs* carried on the business of a wine and spirit merchant in Bond Street; and that, in November 1830, he agreed to sell to the bankrupt (who was his son) all his stock in trade, and other effects connected with his business, and certain leasehold messuages and premises situate in Bond Street, where the trade was carried on, and the goodwill of the trade, for an annuity of 400*l.* to be paid to *W. H. Phibbs*, and of 200*l.* a year to his wife, *Jane*

A contingent annuity is proveable under 6 Geo. 4. c. 16. sect. 54. before the happening of the contingency.



1836.

—  
*Ex parte*  
 VANHEYTHUSEN.  
 In the matter  
 of  
 PHIBBS.

*Phibbs*, in case she should survive him; and the bankrupt thereupon executed an indenture, dated the 18th of November 1830, made between *W. H. Phibbs* of the first part, the bankrupt (*George Phibbs*) of the second part, the said *W. H. Phibbs* and *Jane* his wife of the third part, and the petitioner, *R. E. Vanheythusen*, of the fourth part, after reciting as therein recited, it was witnessed, that for the considerations therein mentioned *George Phibbs* granted, bargained, sold, and confirmed unto *W. H. Phibbs* and his assigns, for and during his natural life, an annuity of 400*l.*, and unto *Jane Phibbs*, in the event of her surviving *W. H. Phibbs*, and her assigns, for and during the then remainder of her natural life, an annuity of 200*l.*; to have, hold, receive, take, and enjoy the said annuity or yearly sum of 400*l.*, and every part thereof, unto the said *W. H. Phibbs* and his assigns, for and during the then remainder of the term of his natural life, payable as therein mentioned, and to have, hold, receive, take, and enjoy (in the event of the said *Jane Phibbs* surviving the said *W. H. Phibbs*) the said annuity or yearly sum of 200*l.* and every part thereof unto the said *Jane Phibbs* and her assigns, for and during the then remainder of the term of her natural life, to be paid and payable to her and her assigns at the times and in manner therein mentioned; and that the petitioner was appointed a trustee of the said leasehold premises, stock in trade, and other effects thereby assigned, for the purpose of securing the payment of the said several annuities in case the bankrupt should refuse or neglect to pay the same.

A fiat in bankruptcy, dated the 24th of August 1835, issued against *George Phibbs*.

At the time of the bankruptcy of *George Phibbs* the sum of 44*l.* 16*s.* 7*d.* was due to the petitioner, *W. H. Phibbs*, for arrears of the annuity of 400*l.*



The petitioner caused a valuation of the annuity of 400*l.* payable to *W. H. Phibbs*, and of the contingent annuity of 200*l.* a year payable to *Jane Phibbs* in the event of her surviving her husband, to be made by Mr. *Morgan*, actuary of the equitable assurance office, for the purpose of proving the amount at which such several annuities should be valued against the estate of the bankrupt. The value of the annuity of 400*l.* for the life of *W. H. Phibbs*, as estimated by Mr. *Morgan*, was 1,897*l.*, and the value of the contingent annuity of 200*l.* granted to *Jane Phibbs*, payable to her in the event of her surviving her said husband, amounted to the sum of 905*l.*

1836.  
—  
*Ex parte*  
VANHEYTHUSEN.  
In the matter  
of  
PHIBBS.

The petitioner, as the trustee and on the behalf of *W. H. Phibbs* and *Jane* his wife, tendered proof of the sum of 441*l.* 16*s.* 7*d.* for arrears of the annuity, and of 1,897*l.* and 905*l.* the estimated values of the same annuities. The commissioners admitted the proof for 1,897*l.* for the value of the annuity of 400*l.* a year during the life of *W. H. Phibbs*, but refused the proof for 905*l.*, the estimated value of the contingent annuity of 200*l.* payable to *Jane Phibbs*, on the ground that the clause directing annuities to be valued did not apply to contingent annuities. (a)

The petition prayed that the commissioner might be directed to permit the 905*l.*, the estimated value of the contingent annuity, to be proved, &c., and any dividend might be paid to the petitioner as trustee.

Mr. *K. Parker* for the petition: — This is an application to prove a contingent annuity under 6 Geo. 4. c. 16. s. 54. (a), which enacts that “any annuity” may

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(a) That any annuity creditor and whether there were or not any of any bankrupt, by whatever assurance the same may be secured, arrears of such annuity due at the bankruptcy, shall be entitled to



1836.

*Ex parte*  
VANHEYTHUSEN.  
In the matter  
of  
PHIBBS.

be proved, and consequently includes contingent annuities. It is not disputed that this is capable of valuation. If the case does not come within section 54., still it will be proveable as a contingent debt under section 56. (a), on which clause a construction favorable to the petitioner was put in *ex parte Tindal*. (b)

An annuity not  
proveable under  
sect. 54. is not  
assisted by  
sect. 56.

The CHIEF JUDGE:—The Courts of Common Law decided, in *Thompson v. Thompson* (c), that an annuity not proveable under clause 54. was not assisted by clause 56.

Mr. Bird for the assignees, *contra*:—There are some formal objections. The petitioner assumes to be a trustee to whom the annuity is payable; such is not the

prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission,—6 Geo. 4. c. 16. s. 54.

(a) That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of the commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value

thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.—6 Geo. 4. c. 16. s. 56.

(b) *Ex parte Tindal*, *Mont.* 375 and 462. S. C. 1 *Moo. & Sc.* 607.

(c) *Thompson v. Thompson*, 2 *Bing.* 168, new series.



case, and therefore Mrs. *Vanheythusen* must be a party, and there is no proof that she is alive; and the consideration, though set out in the petition, is not in the affidavit in support.

1836.

—  
*Ex parte*  
VANHEYTHUSEN.  
In the matter  
of  
PHIBBS.

*Per Curiam* : — If the objection as to want of parties is pressed, the petition must stand over to be amended. The commissioner will not admit the proof without evidence of Mrs. *Vanheythusen* being alive, and he will also apply the proper rules as to the valuation.

Mr. *Bird* : — The substantial objection is, that clause 54. does not apply to contingent annuities; it refers to “arrears,” which can only exist in an annuity in possession. Then clause 56. speaks of “any annuity creditor;” now Mrs. *Vanheythusen* was not a creditor at the time of the bankruptcy; no debt existed; merely a contingent liability which might never become a debt; and therefore, according to *ex parte Marshall (a)*, there is no debt proveable.

The CHIEF JUDGE : — Are we to construe the word “creditor” in the strict sense in which it is used in the other sections of the act? Does not the nature of the enactment of section 54. require a more liberal construction?

Sir *John Cross* : — The legislature could hardly have intended to use the word “creditor” in its strict legal signification, because no annuity is a debt, save as to its arrears, unless secured by bond.

Sir *George Rose* : — The question is, whether a contract to pay does not exist, the time for payment being

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(a) *Ex parte Marshall*, 1 Mont. & Ayr. 145.



1836. postponed? Does not "any annuity creditor" simply mean "any annuitant"?

*Ex parte*  
VANHEYTHUSEN.  
In the matter  
of  
PHIBBS.

*Per Curiam*: — At present the Court entertain no doubt that the trustee and cestuique trust may together prove; but, being a new point, the Court will take time to consider its judgment.

*Cur. ad. vult.*

An order was subsequently made for liberty to prove.

C. of R.  
Jan. 15,  
March 8,  
1836.

On a petition to reverse the adjudication, a reference made to the commissioner to put a new deposition as to the petitioning creditor's debt on the proceedings.

*Ex parte* GARTLEY.—In the matter of GARTLEY.

THIS was a petition by the bankrupt to reverse the adjudication, stating that he was not indebted to *Davies*, the petitioning creditor, in any sum, either at the time of his making the affidavit on striking the docket, or at the issuing the fiat.

It appeared by the affidavit filed in answer, that in 1834 *Gartley* was indebted to *Davies* in 409*l.*; and *Gartley* being unable to pay, procured *Richards* and Co. to advance the money to *Davies*, *Gartley*, and *Davies*, giving to *Richards* and Co. their joint and several promissory notes; *Richards* and Co. consented to receive the amount from *Gartley* by instalments.

The petition stated, "It being fully understood by *Davies* and *Gartley* that the money so to be paid by *Gartley* was to be in liquidation and discharge of the debt still owing to *Davies* by *Gartley*, without prejudice to *Davies*'s claim for whatever balance might remain unpaid, and that *Davies* should sign the promissory note, as a surety only for the ultimate payment of the money to *Richards* and Sons."



*Gartley* paid off some of the instalments, but in August 1835 *Richards* and Co. commenced an action against *Davies* on the note, for 190*l.* the balance then due; *Gartley* was also arrested, and went to prison.

1836.

*Ex parte*  
GARTLEY.

In the matter  
of  
GARTLEY.

On the 24th of September 1835 *Davies* struck a docket against *Gartley*, and on the 29th paid *Richards* and Co. the 190*l.* and costs.

*Davies* was chosen assignee, and proved under the fiat, under the surety clause 6 Geo. 4. c. 16. s. 52.

Mr. *Chadwicke Jones*, for the petition, submitted, that it was clear the fiat must be annulled, as the debt was not due when the docket was struck, nor for some days afterwards.

Mr. *J. Russell*, *contra*.

The CHIEF JUDGE:— The bankrupt does not deny the agreement that the sums paid should go in reduction of the debt, and that the amount not so paid off should remain a debt.

Mr. *C. Jones* asked that the petition might stand over, to answer the affidavit stating this, which was not granted.

The CHIEF JUDGE:— Let it be referred back to the commissioner to revise the petitioning creditor's debt. The affidavits on this petition disclose a state of circumstances which is not disclosed on the depositions in support of the fiat; and let the commissioner be at liberty to receive any further deposition of the petitioning creditor's debt, or to vary the existing deposition, with liberty to state special circumstances.



1836.

March 8. — This day the petition was again in the paper, but the bankrupt did not appear.

*Ex parte*  
GARTLEY.

In the matter  
of

GARTLEY.

March 8.

Mr. *J. Russell* stated, that the commissioner had placed a new deposition on the proceedings, which was conceived to be sufficient, and as the bankrupt did not appear he asked the petition to be dismissed, which was ordered.

Petition dismissed. (a)

C. of R.  
Jan. 15,  
1836.

*Ex parte* PHILLIPS.—In the matter of PHILLIPS.

An agreement  
by an assignee  
to pay the soli-  
citor to the fiat  
interest on the  
amount of his  
bill of costs does  
not bind the  
estate, and can-  
not be retained  
out of the sur-  
plus.

THIS was the petition of the heir at law of *Phillips*, a bankrupt, the commission having been superseded.

The petitioner became entitled to the surplus, the greater part of which the commissioner ordered to be paid over to him, but directed a portion, amounting to 474*l.*, to be retained on account of a claim made by Mr. *Potts*, the late solicitor to the commission, being the amount of interest on his bills of costs delivered in 1818, subject to an inquiry whether *Dignum*, the late assignee, did duly contract to pay such interest, and whether the suits in respect whereof the costs had been incurred were properly conducted by *Potts*. The bills were for one revived suit, in which *Dignum*, the assignee, was plaintiff, and three suits in which he was defendant.

In August 1830 a resolution of creditors was passed at a meeting convened by advertisement, which was

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(a) This case illustrates the inutility of petitioning to reverse the adjudication, instead of petitioning to annul the fiat.



signed by *Dignum* and another creditor, authorizing the assignee to pay interest on the amount of the bill of costs. The petitioner insisted he was entitled to the 474*l.*, as the contract to pay interest did not bind the estate, and prayed that the 474*l.* might be paid over to him as part of the surplus to which he was entitled.

1836.

—  
*Ex parte*  
PHILLIPS.  
In the matter  
of  
PHILLIPS.

Mr. *Swanston* (with whom was Mr. *J. Russell*) for the petitioner:—There is a surplus, to which the petitioner is entitled. The solicitor, however, claims interest thereout. His assumed claim is founded on a promise by the assignee to pay him interest on his bill, which the assignee undertook to do, not having assets whereout to pay the bill; but that promise does not bind the bankrupt.

Mr. *Swanston* was here stopped by the Court.

Mr. *Ching* and Mr. *Bethell*, *contra*:—There are two objections to the form of this petition; first, the respondent is no party to the commissioner's order that the surplus should be paid over to the heir of the bankrupt; second, this petition is against the solicitor, but it should be against the assignee calling on him to account for the surplus.

Mr. *Swanston* and Mr. *J. Russell* stated that they were authorized to appear for the assignee also.

*Per Curiam*:—If the objection of form is insisted upon the petition must stand over; but as the parties are now in other respects prepared to argue the essential point, perhaps it will be more advisable to waive the formal objection.



1836.

Mr. *Swanston* and Mr. *J. Russell* : — We undertake to make the assignee a co-petitioner.

Ex parte  
PHILLIPS.

In the matter  
of  
PHILLIPS.

Mr. *Ching* and Mr. *Bethell* then waived the points of form : —

There is no objection to a solicitor taking security for costs already incurred; *Williams v. Piggott*. (a) The assignees contracted to pay interest; that contract was prudent, and beneficial to the bankrupt's estate, and therefore binding on the bankrupt. That it was beneficial to the estate is clear; the only means of recovering the estate was through a suit in the Exchequer; the solicitor demanded his costs, or threatened to abandon the suit; the assignee, not having assets wherewith to pay this, promised, that if the solicitor would not abandon the suit he would pay interest on the costs incurred. In fact, the whole estates got in under the bankruptcy arose from the suits in the Exchequer.

In equity, where a trustee has not a strict right to do certain acts which are beneficial to the trust property, it is common to refer to a Master to report whether such acts will be beneficial; and if the trustee has already acted without such reference, the Court would subsequently confirm such acts. If a trustee had suggested that he could not continue a beneficial suit unless he contracted to pay debts, &c., would not such contract be confirmed by the Court? An executor may mortgage the testator's property, and charge the estate with interest. If the assignees had refused to pay interest, and the solicitor had thereupon declined to continue the cause, the property must have been lost, as the solicitor could not be compelled to

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(a) *Williams v. Piggott*, 1 Jac. 598.



give up the papers till his bill was paid; *Lord v. Wormleighton*. (a) 1836.

In *Cooke v. Setree* (b) Lord *Eldon* says, "It may be very fair as between them to say that the situation of the attorney was such that he could not go on, and therefore presented his bill, desiring either payment or security in part." At any rate, as the money which ought to have been paid the solicitor was invested in stock, and since sold at a profit of 10% per cent., surely the solicitor is entitled to that profit.

*Ex parte*  
PHILLIPS.  
In the matter  
of  
PHILLIPS.

The CHIEF JUDGE : —

The circumstances of this case are such as would induce me to assist the respondent if possible, as the case is one of hardship upon him. This question arises, it appears, under a resolution of some creditors in 1812, that the assignees should pay Mr. *Potts* interest on his bills, and to allow that interest to the assignees in their accounts. Now, if the creditors present at that meeting had power to bind those who were absent, there would be no difficulty; but such is not the case. In 1823 *Dignum* renewed his undertaking, the original undertaking being lost. The question is, whether the estate is bound by the resolution of some creditors, and the undertaking of *Dignum*. It appears to me that the estate would have been bound if, on the audit of the assignee's accounts, this sum had been allowed as "a just allowance," and a creditor had objected, but the commissioners or the Court had over-ruled the objection. But the question here is simply, whether an assignee, owing money to the solicitor to the estate

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(a) *Lord v. Wormleighton*, 1 Jac. 580.

(b) *Cooke v. Setree*, 1 Ves. & Bea. 128.



1836.

*Ex parte*  
PHILLIPS.In the matter  
of  
PHILLIPS.Assignees are  
bound to carry  
on beneficial  
suits.If they decline  
they may be  
removed.They may apply  
to the Court  
for directions  
how to act.

for his bill, can bind the other creditors by an undertaking to pay interest? An assignee is bound to carry on suits which are supposed to be beneficial to the estate. If he decline, the creditors may apply to have him removed; if he find any difficulty, he may apply to the Court to know how he is to act. No such course was here pursued. The assignee employs and is personally liable to the solicitor for the costs of suits and actions, whether they be successful or not. In 1818, he, being so responsible, Mr. *Potts* demands payment; the assignee asks forbearance, and undertakes to pay interest: this relieves the assignee from the pressure of the demand for the time. It is suggested the assignee would have been justified in borrowing money to pay, and would have been allowed to charge the interest thereon in his accounts. I do not know what might be my judgment in that suppositious case; I think, however, he would not be entitled to charge such interest; but that is not a point now necessary to decide. It has not been proved that there would have been any difficulty in carrying on the suit if *Potts* had refused to continue it.

*Lord v. Wormleighton* (a) does not give the solicitor a lien if he refuses to continue the suit; that is only where he is discharged by the client. If the solicitor refuses to go on he must produce the papers, though he cannot be compelled to give them up unless paid. I am of opinion, therefore, that neither on principle or under the bankrupt acts had the assignee any power to charge this interest on the estate, and that any creditor might object, and that the heir of the bankrupt is entitled to the surplus, free of this claim. As this is a case of

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(a) *Lord v. Wormleighton*, 1 Jac. 580.



hardship the Court are of opinion that the costs may come out of the surplus.

1836.

*Ex parte*  
PHILLIPS.  
In the matter  
of  
PHILLIPS.

Sir *John Cross* : — In this case the contracting parties are the assignees, who have not paid the interest, but call on the bankrupt, not a contracting party, to pay. The contract is a fair one ; but the question is, who is bound ? If the assignees have any right to be indemnified, it is not by the bankrupt, but by the creditors present at the meeting. If this had been a charge upon the estate, why were the creditors paid in full, with interest, without reference to this supposed charge ? I concur with the judgment of the Court.

Sir *George Rose* : — If this contract of the assignees would have bound absent creditors, it would be binding on the estate and on the bankrupt ; but such is not the case. If I were sitting as commissioner at an audit meeting, and found this item for interest charged in the accounts of the assignees, I should feel obliged to strike it out, as against all creditors but those who were consenting parties to the contract. If the assignees could have contended that the contract was beneficial to the estate, perhaps the Court might have given a reference to inquire thereto ; but it appears to me that no report could ever have been obtained in the affirmative. The question has been most ably argued ; and I confess I regret being compelled to come to the conclusion, that the solicitor is not entitled to what he asks.

Commissioners  
not to allow in-  
terest on the  
solicitor's bill  
of costs.

Declare the solicitor not entitled to interest out of the surplus, and that the petitioners are entitled to the whole fund ; and let the costs of this application, as between solicitor and client, come out of the surplus.



C. of R.  
Jan. 15,  
1836.

On a petition to reverse the adjudication and annul, the proceedings are not evidence against the bankrupt, unless notice of intent to use them is given, and copies allowed.

*Ex parte* GOODWIN.—In the matter of GOODWIN.

THIS was the petition of the bankrupt to reverse the adjudication under 1 & 2 W. 4. c. 56. s. 17., and if that were done to annul the fiat, the petitioner undertaking not to withdraw his petition.

The petition being called on,

Mr. *Howard*, for the petition, asked to be allowed copies of the depositions, on the authority of *ex parte Jackson* (a) and *ex parte Smith*. (b)

Mr. *Bird*, for the assignees, *contra*.

THE COURT stated, that no doubt copies might be allowed, on the petitioner filing an affidavit that he *bond fide* wanted them for the purposes of this petition, and on his undertaking not to withdraw the petition.

The CHIEF JUDGE:—I beg to suggest, however, that as the respondents have filed no affidavits in reply they have no case, unless they depend on the depositions; but before the respondents can use them notice of intent to use them must be given to the bankrupt, and copies allowed to be taken.

Sir *John Cross*:—These *ex parte* depositions are clearly not evidence against the bankrupt.

Sir *George Rose*:—It is clear the depositions are not evidence against the bankrupt; nothing is evidence

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(a) *Ex parte Jackson*, Mont. & Bli. 394.

(b) *Ex parte Smith*, 3 Dea. & Ch. 101.



against the bankrupt on his petition to supersede which would not be evidence against him in an action of trespass brought by him against his assignees.

Mr. *Howard* here asked leave to amend the petition, by striking out that part which prayed a reversal of the adjudication, and brought the case within the 17th section of 1 & 2 W. 4. c. 56.

*Per Curiam*: — Let the petition stand over, to be amended as asked.

1836.

*Ex parte*  
GOODWIN.  
In the matter  
of  
GOODWIN.

*Ex parte* POWELL.—In the matter of LORYMER.

C. of R.  
Jan. 19,  
1836.

THIS was the petition of *Joshua Powell* and *Timothy Powell*, executors of *Joshua Powell*, deceased.

Previously to January 1829, *James Lorymer*, being indebted to *Joshua Powell* in 24,000*l.*, entered into an agreement to pay 1,200*l.* a year by quarterly payments, with interest, till the whole was discharged, and that while such payments were regularly made, *Joshua Powell* should not demand the 24,000*l.* or any part thereof. This agreement was signed by *Joshua Powell* and *James Lorymer*; and at the foot of the agreement was the following guarantee by *Samuel Lorymer*:—"It is also agreed that *Samuel Lorymer* of, &c., shall be responsible for the due payment of the above amount, as specified herein.

"*J. Powell. J. Lorymer.*"

In July 1831, on the representation of *James* and *Samuel Lorymer* that they were unable to pay their creditors in full, *Powell* agreed to take 12,000*l.*, and took six joint and several promissory notes of *James* and

A. owed 24,000*l.* to B., which C. guaranteed; then B. agreed to take 12,000*l.* on the joint notes of A. and C., and gave up the guarantee; the notes were not made, and fiats issued against A. and C.:—Held, B. could only prove what remained due of the 12,000*l.*, as the original guarantee was not revived.



1836.

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*Ex parte*  
 POWELL.  
 In the matter  
 of  
 LORYMER.

*Samuel Lorymer* for 2,000*l.* each, payable one, two, three, four, five, and six years after date.

On receipt of these notes *Powell* delivered up the above agreement to *James Lorymer*.

Only the first of these notes was ever paid.

On the 3d of September 1835 *Powell* died, leaving the petitioners his executors; and on the 18th of the same month two separate fiats issued against *James Lorymer* and *Samuel Lorymer*.

The petitioners were allowed to prove the 24,000*l.* under the fiat against *James Lorymer*; but the commissioner under *Samuel Lorymer's* fiat rejected the proof for that sum under the agreement, and only allowed a proof for the remaining five notes for 2,000*l.* each, assigning as a reason, that as *Samuel Lorymer's* liability was that of a surety merely, and was founded, not upon the original consideration of money lent, but upon the agreement for the delivery up of that instrument upon the substitution of the said six notes for the same there was a legal and complete discharge *pro tanto* of the said debt itself as against *Samuel Lorymer*.

The petitioners insisted, that by the default in payment of the instalments payable under the agreement the debt had become absolute, and immediately recoverable at law against *Samuel Lorymer*; that therefore the consent on the part of *Joshua Powell* to take a part for the whole was without consideration, and void; that as the notes furnished no new consideration for the release or discharge of any part of the original debt under the agreement, the same remained in full force as well against *Samuel Lorymer* as *James Lorymer*. The petition therefore prayed leave to prove against the separate fiat against *Samuel Lorymer* for 24,000*l.*, and interest to the date of the fiat.



Mr. *Twiss* and Mr. *Koe*, for the petition, contended there was no such alteration in the nature of the contract as discharged the surety, and that nothing would discharge a debt but payment, or what was equivalent thereto; and cited *Hall v. Wilcox* (a) and *Fitch v. Sutton*. (b)

1836.

Ex parte  
POWELL.  
In the matter  
of  
LORYMER.

Mr. *Swanston* and Mr. *J. Russell*, *contra*, were stopped by the Court.

The CHIEF JUDGE:— The bankrupt guaranteed to pay the debt, if *James* did not. If the bankrupt had been no party to the new agreement, he would have been discharged, according to the common doctrine of law. It is said he was a party to the new contract; but how? He consented to the alteration made by the second agreement; yet it was only upon the terms introduced by that second agreement. The first agreement was delivered up to *James Lorymer*, which could have been done for no other purpose than to waive all right thereunder. It therefore comes to this; the intent of the parties was to destroy that first agreement as against the surety. This, indeed, would not destroy the debt of the principal. The liability of *Samuel Lorymer* now depends on the second agreement only.

Sir *John Cross* concurred. The agreement was delivered up absolutely to be cancelled.

Sir *George Rose*:— This is a matter of fact; viz. the intent with which the first agreement was delivered up, as to which I concur with the rest of the Court.

Petition dismissed, with costs.

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(a) *Hall v. Wilcox*, 1 Moo. & Rob. 58.

(b) *Fitch v. Sutton*, 5 East, 230.



C. of R.  
Jan. 20,  
1836.

A trader covenanted to pay a sum to the trustees of his marriage settlement, on trust to pay *half* the interest to wife, half to husband, and usual trusts for wife and children: he became bankrupt, having paid part only: the trustees alone allowed to prove, and the dividends on the *whole* proof paid into Court and accumulated till the amount agreed by the husband is made up: with liberty for any party to apply.

*Ex parte* ABEL SMITH and THOMAS HUGHES ANDERDON.—In the matter of WILLIAM MANNING, FREDERICK MANNING, and JOHN LAVICOT ANDERDON.

**T**HIS was a petition by two (out of four) of the trustees of a marriage settlement, to prove debts against the separate estates of *Manning* and of *Anderdon*.

In 1816, previous to the marriage between *John Lavicot Anderdon* and Miss *Manning*, daughter of *William Manning*, it was agreed that *William Manning* should invest 5,000*l.* in bank stock, as the portion of Miss *Manning*, and also secure her 5,000*l.* to be paid at his decease; and *J. P. Anderdon* (the father of *John Lavicot Anderdon*) agreed to secure 5,000*l.* to be paid at his death; and *John Lavicot Anderdon* agreed to secure 5,000*l.* by instalments; and the above property was to be vested in the names of the petitioners and of *Frederick Manning* and *B. T. Claxton*, as trustees, on trusts to be declared by a deed of settlement thereafter to be executed.

*William Manning* accordingly invested 5,000*l.* in 8,113*l.* three per cent. consols, in the names of the four trustees; and in 1816 gave them a bond for 5,000*l.*, payable twelve months after his decease. *John Procter Anderdon* (the father) gave the trustees a bond for 5,000*l.*, and *John Lavicot Anderdon* gave the trustees a bond for payment of 1,000*l.* in 1819, and 1,000*l.* each of the four following years.

In 1816, by a settlement before the marriage, made between *John Procter Anderdon* of the first part, *John Lavicot Anderdon* of the second part, *William Manning* of the third part, Miss *Manning* of the fourth part, and *Abel Smith* and *Thomas Hughes Anderdon* (the peti-



tioners) and *Frederick Manning* and *B. T. Claxton* (the four trustees) of the fifth part, it was declared that after the solemnization of the then intended marriage the four trustees should stand possessed of the three per cent. consols and of the three sums of 5,000*l.* each, upon trust to call in the three sums of 5,000*l.* or any parts thereof when payable, and invest the same in three per cent. consols in the names of the four trustees, with power to alter and vary the same, with consent in writing of *John Lavicot Anderdon* and *Miss Manning*, upon trust, during the joint lives of *John Lavicot Anderdon* and *Miss Manning*, to pay the interest, dividends, and annual produce of one moiety or half part of the trust monies to *John L. Anderdon* and his assigns, for his and their proper use and benefit; and upon trust to pay the interest, dividends, and annual produce of the remaining moiety to *Miss Manning*, for her sole, separate, and peculiar use and benefit, independent of the said *John L. Anderdon* her intended husband, who should not intermeddle therewith or with any part thereof, nor should the same or any part thereof be in any manner subject or liable to his disposal, control, debts, or engagements; and after the decease of the said *John L. Anderdon* or *Miss Manning*, on trust to pay the interest, dividends, and annual produce to the survivor of them, for his or her own proper use and benefit; and after the decease of the survivor upon certain trusts therein expressed in favor of the children of the marriage and their issue; and in default of such children or issue, then, as to one equal half part of the 8,113*l.* three per cent. consols, and of the 5,000*l.* secured by the bond of *William Manning*, and the securities on which the same should be invested, in trust for such person or persons as *Miss Manning* should direct or appoint, and in default thereof in trust for the persons who at her decease

1836.

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*Ex parte*  
SMITH  
and another.  
In the matter  
of  
MANNING  
and others.



1836.

—  
*Ex parte*  
 SMITH  
 and another.  
 In the matter  
 of  
 MANNING  
 and others.

would be entitled, under the statutes for distribution of intestates' estates, to her personal estate, if she died intestate, and without having been married; and as to the remaining moiety of the 8,113*l.* three per cent. consols, and of the sum secured by the bond of *William Manning*, and as to the sums of 5,000*l.* and 5,000*l.*, severally secured by the bonds of *J. P. Anderdon* and *John L. Anderdon*, and the securities whereon the same should be invested, in trust for *John L. Anderdon*, his executors, &c., for his and their own proper use and benefit.

The marriage took place, and Mr. and Mrs. *Anderdon* were both living, and had several children. *John L. Anderdon* paid to the trustees the first instalment of 1,000*l.*, but the others were not paid. The 8,113*l.* three per cent. consols was sold out in pursuance of the power in the settlement, and the produce invested in a mortgage in the names of the trustees; the remainder of the trust monies were invested in 1,800*l.* exchequer bills.

In 1835 *William Manning* died.

In September 1831 a commission issued against *William Manning*, *Frederick Manning*, and *John L. Anderdon*.

This was a petition by two of the trustees of the settlement (the other two residing abroad), praying that they alone might prove against *William Manning* for 5,000*l.*, and that they might be declared to have such lien on the interest of the sum invested in mortgage and on the exchequer bills, and the sums to arise from the bonds of *William Manning* and *John Procter Anderdon*, during the life of *John L. Anderdon*, as he would have been entitled to; and that it might be referred to the commissioners to ascertain the value of the interest of *John L. Anderdon* in the trust monies; and in case such value should not amount to 4,000*l.*, then that the same



should be deducted from the 4,000*l.* due on *John L. Anderdon's* bond, and that the petitioners might prove against the separate estate of *John L. Anderdon* for the deficiency; and that the petitioners, during the life of *John L. Anderdon*, might retain the annual proceeds of the dividends on the proof, until the 4,000*l.* should be made up.

1836.

*Ex parte*  
SMITH  
and another.  
In the matter  
of  
MANNING  
and others.

Mr. *G. Richards* and Mr. *Reynolds* for the petition:—  
The wife claims a right to have the dividends accumulated until 2,000*l.*, half the 4,000*l.*, is made up, and she is then entitled to the dividends thereof for life. This right of the wife has lately been recognized in *ex parte King* (a), which refers to all the former cases.

The CHIEF JUDGE:—This Court can order the proof to be made, and declare the assignees not entitled to any of the dividends on the trust monies, till the amount of the trust fund is made up, after which the trustees will pay half the interest to the wife, and the other half to the assignees. If the dividends on the proof, therefore, are ordered to be paid into Court, and to accumulate till further order, it would relieve all parties from a difficulty which exists as to the jurisdiction of this Court interfering touching the equities of the wife, and especially the children, who being infants, this Court cannot prevent them hereafter from filing a bill against the trustees.

Mr. *G. Richards*:—The wife is entitled to the interest of half the trust fund; therefore the interest on her half of the dividend under the fiat ought not to

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(a) *Ex parte King*, 1 *Mont. & Ayr.* 107.



1836. accumulate, especially after *ex parte Turpin* (a) and *ex parte King*. (b) [The CHIEF JUDGE:—In *ex parte Turpin* (a) accumulation was ordered on the petition of the assignees.] But *ex parte King* (b) was not the application of the assignees.

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*Ex parte*  
 SMITH  
 and another.  
 In the matter  
 of  
 MANNING  
 and others.

Mr. *Swanston* for the assignees:—No such petition as the present is necessary. The petitioners might properly apply for an order to prove merely; but the question, of how the dividends are to be disposed of, this Court is not now competent to decide. It would be contrary to first principles to bind the assignees by an order, when the other party cannot be so bound.

The CHIEF JUDGE:—This Court can only make a protective order on the present petition. The dividends must be ordered into Court; then the parties claiming to be entitled thereto must apply for those dividends, and thus bring themselves within the jurisdiction. If the bankrupt had applied for the money, any Court of Equity would have imposed terms, and the assignees stand in his shoes; but they do not now apply, neither does the wife nor the children, consequently the question cannot now be disposed of. The order proposed would not be made if it precluded the wife from her right to the interest of a moiety of the dividends; but that is a question between the wife and those having an interest in remainder,—parties not now before the Court. But the fund should be secured till she applies, and all proper parties are in court. As two only of the trustees are to prove, an order is necessary to enable that to be done, which enables the Court to attach a condition,

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(a) *Ex parte Turpin*, Mont. 443.

(b) *Ex parte King*, 1 Mont. & Ayr. 107.



viz. that the dividends be invested in this Court, subject to any future application.

1836.

Sir *John Cross* : — I concur in the order, so far as it extends; but it appears to me that it might be carried further, and the wife's interest now ordered to be paid to her.

*Ex parte*  
SMITH  
and another.  
In the matter  
of  
MANNING  
and others.

Sir *George Rose* : — I concur in the order. When parties must come here for liberty to prove, the Court frequently imposes terms. As there is no dispute as to the amount, the order may settle that. Let the trustees' costs be retained out of the dividends, and the assignees' costs out of their several estates in proportion.

The order made was:—Let the petitioners be admitted creditors in both bankruptcies for the two sums of 5,000*l.* and 4,000*l.* Costs of the trustees out of the fund proportionately. Costs of the assignees out of the estate. The surplus of the dividends (after paying the costs) to be paid into Court. Liberty to any party to apply for the same.

*Ex parte* WHITE. — In the matter of WHITE.

C. of R.  
Jan. 21,  
1836.

THIS was the petition of the bankrupt for liberty to prove against his own estate a debt due from him upon a bond, the obligee having died, and appointed him (the bankrupt) his executor; and also praying that an error in the condition of the bond might be corrected, which by mistake was made in the disjunctive; the mistake was apparent from the evidence.

The Court can rectify a clear mistake in the condition of a bond to enable a proof to be made.

Mr. *Mylne* for the petition.

Mr. *Tamlyn*, for the assignees, consenting, the order was made as prayed.



C. of R.  
Jan. 21,  
1836.

Costs ordered  
to be paid by  
the bankrupt of  
a reference  
taken by him,  
upon his peti-  
tion to annul  
for want of  
requisites.

*Ex parte* NEIRINCKS. — In the matter of  
NEIRINCKS.

A PETITION had been presented (reported *ante*, p. 384.) by the bankrupt to supersede for want either of a sufficient trading or petitioning creditor's debt. The trading was decided to be sufficient; but, upon the application of the bankrupt, it was referred to Mr. *Gregg* to inquire whether there was a good petitioning creditor's debt; and further directions and costs were reserved. Mr. *Gregg* reported that there was a good petitioning creditor's debt. An application was now made to confirm the report. The only question was, whether the bankrupt should pay the costs of the inquiry.

Mr. *Swanston* and Mr. *Sturgeon* for the bankrupt: — There is no ground why this case should be made an exception to the general rule, that a bankrupt coming here to supersede his commission does not pay costs. The inquiry might have been made on an issue at *Nisi Prius*, the costs of which would have come out of the estate. The Vice Chancellor would not grant an issue on facts as to the requisites; but Lord *Eldon* overruled that decision, and settled the practice, that on conflicting evidence the Court would not decide without an issue. The question of fact in this case was doubtful, and that alone was sufficient to justify the bankrupt in asking for the reference. If the Court decides that the bankrupt must pay the costs of this inquiry, parties will always prefer a trial at law.

Mr. *Twiss*, for the assignees, said they had no estate.

The CHIEF JUDGE: — The Court was prepared to determine the sufficiency of the petitioning creditor's debt



when the petition was heard. The bankrupt prayed for further inquiry, which was allowed him, but the reference was taken upon terms of payment of costs if unsuccessful.

1835.

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*Ex parte*  
NEIRINCKA.  
In the matter  
of  
NEIRINCKS.

The rest of the Court concurring, the report was ordered to be confirmed, and the bankrupt to pay the costs of the inquiry.

*Ex parte* CROSFIELD.—In the matter of SAMUEL COOPER.

C. of R.  
Jan. 28.  
1836.

**CHARLES COOPER** and *Samuel Cooper*, who were not partners, gave the petitioner *Crosfield* six joint promissory notes. They were for a consideration given to *Charles Cooper*, and *Samuel Cooper* joined as surety. *Samuel Cooper* became bankrupt, and a proof was tendered against his estate for the amount of the bills, which was rejected, on the ground that this was a joint note, and that no proof could be made without evidence that there was no joint estate, and while there was a solvent partner. After this rejection *Charles Cooper* also became bankrupt. This was a petition to prove against the estate of *Samuel Cooper*.

The rule that proof cannot be made on a joint debt if there is a solvent partner, only applies to actual partnerships, not to cases where one joins in a joint promissory note as surety, &c. for another, they not being partners.

Mr. *Swanston* and Mr. *Dixon* for the petition.

Mr. *J. Russell*, *contrà*:—This is a joint note, and therefore cannot be proved by the petitioner against the separate estate of one of the makers. Before that can be done it must be proved that there is no joint estate, and no solvent partner; when the proof was tendered there was no such evidence, and the subsequent bank-



1836.

*Ex parte*  
CROSFIELD.  
In the matter  
of  
COOPER.

ruptcy of *Charles Cooper* can give the petitioner no right to come here on a petition of appeal. If the subsequent bankruptcy has any effect, he may again tender a proof before the commissioner. Where there is a solvent partner proof is not allowed; or, if allowed, it is because there is no joint estate or solvent partner in England; *ex parte Pinkerton* (a); *ex parte Sadler*. (b) And sometimes, where allowed, a restraint is put upon the dividend; *ex parte Kensington*. (c) [Sir G. Rose: — The rule only applies to actual partnerships.] *Ex parte Pinkerton* (a) and *Rawston v. Parr* (d) are cases of the application of the rule, though no partnership existed.

Mr. *Swanston*, in reply, was stopped by the Court.

The CHIEF JUDGE: — When the proof was tendered, the commissioner might think that *Charles Cooper*, being solvent, gave an equity to the creditors of *Samuel*, that the holder of the notes should first proceed against *Charles Cooper*. There was, however, no partnership; and therefore the rule preventing a joint creditor proving against the separate estate of a partner, where the other is solvent, cannot apply.

Sir J. Cross: — If judgment had been obtained on these joint notes, execution might have been levied on the goods of either of the defendants. Bankruptcy practically prevents execution at law; and the rule ought, by analogy, to enable a proof to be made against either estate.

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(a) *Ex parte Pinkerton*, 6 Ves.  
814, in note.

(b) *Ex parte Sadler*, 15 Ves.  
52.

(c) *Ex parte Kensington*, 14 Ves.  
447.

(d) *Rawston v. Parr*. 3 Russ.  
539.



Sir G. Rose : — A right to issue a separate fiat and a right to separate proof on a legal debt are convertible terms. The rule adverted to in the argument only applies to actual partnerships.

1836.

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*Ex parte*  
CROSFIELD,  
In the matter  
of  
COOPER.

*Ex parte* KNIGHT. — In the matter of LEWIS.

C. of R.  
Jan. 28,  
April 28,  
1836.

THIS was a petition to prove a debt rejected for want of entries in the petitioner's books.

The petition stated, that the petitioner was a gold watch dial maker, and the bankrupt a merchant. The fiat was dated the 11th of August 1835.

The petitioner tendered before Mr. Commissioner *Evans* a proof for 418*l.* on the bills of exchange; one for 200*l.*, dated 14th February 1835, at six months; another for 123*l.*, dated 1st March 1835, at six months; and another for 95*l.*, dated 27th March 1835, at six months.

Commissioners ought not to act on a *general* rule, to reject a proof because the item is not entered in account books, when books are kept. *Semble.*

Mr. *Evans* having been informed of the alleged items making up the amounts of these bills, (watches, a cameo, emeralds, and sixty gold dials,) asked whether the petitioner had any account in his books of the several items; the petitioner stated, that the three bills were entered in his bill book, and that most of the items (watches, cameos, emeralds,) were not entered in his books, as they were not made by him, or immediately connected with his business of a gold dial maker, it not being his practice to enter such matters; but that sixty gold dials (for which the 95*l.* bill was given), being made by him, and connected with his business, were entered in his books; that neither the assignees, nor the official assignee, nor any creditor of the bankrupt, alleged any circum-



1836.

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*Ex parte*  
 KNIGHT.  
 In the matter  
 of  
 LEWIS.

stance or reason tending to impeach the validity of the said three bills, or disputed or offered any objection to the petitioner's right to prove; that Mr. *Evans* refused to allow any proof except for the 95*l.* bill, and alleged as his reason for such refusal, that he had made it a rule never to permit the proof of a debt before him unless the books of the party seeking to prove (*a*) contained satisfactory entries of the debts claimed.

Jan. 28.

A petition was presented to the Court of Review against the decision of the commissioner.

Mr. *Swanston* and Mr. *Bacon* for the petition: — The commissioner has no right to make the rule in question; the petitioner could recover at law on the bills without producing his books to prove the consideration, and therefore may in like manner prove under a fiat.

Mr. *Deacon* and Mr. *Keene*, *contra*.

The CHIEF JUDGE: — I do not think the Court ought to interfere with the decision of the commissioner; the evidence of the petitioner would not have induced me to admit his proof. The bankrupt had absconded with his books, and the loss of the evidence, which would have been supplied by these, rendered it the more necessary not to give credit to mere verbal statements, though supported by oath. Whether consideration were given for the bills ought strictly to be inquired into. Besides, I have inspected the petitioner's books, and I find that there are several entries of other goods besides

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(*a*) The commissioner's rule is not quite correctly stated in the petition; it is (we believe), that no party *who does keep books* shall prove unless there are entries.



gold dial plates having been sold by him to different persons ; so that the reason he gives for the goods in question not having been entered does not hold good.

1836.

—  
*Ex parte*  
KNIGHT.

In the matter  
of  
LEWIS.

Sir *John Cross* : — This was a proper case for a *viva voce* examination ; in the absence of which I think the matter had better be referred back to the commissioner. The public are indebted to the commissioner for his care in preventing fraudulent proofs ; but in this case, unless the truth of the petitioner's statement was impeached, I think his debt ought to have been admitted.

Sir *G. Rose* : — The dismissing this particular petition or not, must not be taken as any expression of opinion, one way or the other, of the propriety or impropriety of the general rule said to be laid down by the commissioner. I, for one, should have rejected this proof on the evidence adduced. But it should be intimated, that a proof ought not to be rejected merely on account of a general rule not to allow in any case a proof of any sum not entered in books, when books are kept. In this case, if the rejection were on such general principle only, it should be intimated to the commissioner that the Court are of opinion the rejection is not justified ; but if the rejection were because he was not satisfied with the evidence of consideration, the rejection might be quite correct. I think that some communication should be had with the commissioner, to ascertain the exact grounds of rejection.

The order made was : — Refer the proof back to the commissioner, with liberty to the petitioner to tender his proof, and be examined thereto. Costs reserved.

The petitioner accordingly went before the commissioner, who allowed the proof, without any argument



1836. or additional evidence. This day the petition was again in the paper, as to costs.

*Ex parte*  
KNIGHT

In the matter  
of  
LEWIS.

April 23,  
1836.

Mr. *Bacon* asked for costs. From the fact that the commissioner required no further evidence, it is clear that the evidence before tendered was sufficient.

Mr. *Keene*, *contra*.

The CHIEF JUDGE :—The Court will give no costs. From my recollection of the case, the petitioner is very well off as it is.

C. of R.  
March 12,  
April 28,  
29, & 30,  
1835.

Jan. 30,  
Feb. 1,  
1836.

A., B., and C. being in partnership, A. retired, a balance being due to him, which B. and C. covenanted to pay by instalments, giving a power of re-entry to A. if any instalment were unpaid, and B. and C. were also to re-assign the premises to A. on trusts for sale; then B. retired, and C. alone continued the business; default was made in payment of an instalment, C. became bankrupt, and A. re-entered. Held, a debt originally due to A., B., and C. was not in the reputed ownership of C., and that A. had a lien thereon.

*Ex parte* EDWIN PEMBERTON.—In the matter of STOKES.

*Ex parte* HANCOX and another, surviving assignees of STOKES.—In the matter of STOKES.

THE petition *ex parte Pemberton* was for payment of certain sums in respect of a lien on the bankrupt's property, and to confirm a report of the commissioners thereon. The petition *ex parte Hancox* was a cross petition by the assignees for a reference back to the commissioners as to whether the property on which such lien was claimed was not in the reputed ownership of the bankrupt. There were also several other questions, which are not here reported.

In 1803 *George Stokes* carried on business as iron-master, in partnership with *Samuel Pemberton*, *Benjamin Stokes*, and *Thomas Stokes*. *Samuel Pemberton* died in August 1803, leaving *Edwin Pemberton* (the petitioner)



and others his executors, and by his will directed his executors to continue the trade with *George Stokes*, *Benjamin Stokes*, and *Thomas Stokes*. In January 1806 *Benjamin Stokes* retired from the partnership, assigning his share in the partnership to the continuing partners by a deed dated 28th January 1806. In the same year the executors retired from the partnership, and assigned their interest in the business, and in the freehold, leasehold, and copyhold estates of the partnership, to *George Stokes* and *Thomas Stokes*, for 49,600*l.*; and the partnership between *George Stokes* and *Thomas Stokes* and the executors was dissolved as to the executors, and notice thereof published in the London Gazette on the 3d of October 1807. By a deed dated 3d October 1807, the executors, in consideration of 49,600*l.*, assigned to *George Stokes* and *Thomas Stokes* all their share in the partnership stock and partnership debts, and gave a power of attorney to recover the debts. *George Stokes* and *Thomas Stokes* covenanted to pay the 49,600*l.* by instalments of 3,000*l.* at the times in the deed mentioned; and it was provided, that if any instalment were unpaid for thirty days the executors might enter and distrain on the partnership premises; and that if any instalment were unpaid during sixty days, then that the executors might re-enter on the whole late partnership estates and property, and on such re-entry the deed to become void. And *George Stokes* and *Thomas Stokes* covenanted, that on such re-entry they would, on demand, re-assign the whole partnership premises to the executors, on trust to sell the same, and pay the 49,600*l.*, or so much as might be then due.

*George Stokes* and *Thomas Stokes* thenceforth carried on the trade together till September 1810, when *Thomas Stokes* retired, and *George Stokes* alone continued the business.

1836.

—  
*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.



1836.

—  
*Ex parte*  
 PEMBERTON  
 and  
*ex parte*  
 HANCOX.  
 In the matter  
 of  
 STOKES.

In 1812 a commission issued against *George Stokes*.

Some time (more than sixty days) previously to the issuing of the commission default occurred in payment of the instalments (a); but it did not appear that *Edwin Pemberton* made any re-entry on the premises till 1826, when, the interest being still in arrear, *Edwin Pemberton* re-entered upon the partnership premises, in pursuance of the clause of re-entry contained in the deed.

In 1826 *Pemberton* presented a petition stating these facts, and praying that the partnership premises might be sold, and the commissioners take an account of what was due to *Edwin Pemberton*, and that the monies be applied in satisfaction of what was due to him, with liberty to prove if any deficiency, &c.

In August 1826 the Vice-Chancellor ordered a reference to the commissioners to take an account of the joint estate of the firm of *Pemberton* and *Stokes* and of the firm of *George* and *Thomas Stokes*, which had come to the hands of *Hancox*, &c., assignees of *George Stokes*, and an account of what was due to *Edwin Pemberton* in his double capacity.

In May 1827 the assignees of *Hancox* appealed against this order; and in February 1829 the Chancellor confirmed the order, adding to the order a declaration that the partnership premises were subject to the debts due to *Edwin Pemberton*.

In October 1830 the commissioners made their report, finding certain properties set out in certain schedules to have been the joint property of *Pemberton* and *Stokes*.

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(a) At the hearing on the 29th of April it was assumed by both sides, that no default occurred till after the bankruptcy; the error having been subsequently discovered led to the re-hearing in 1836. See *post*, p. 559.



One of these schedules contained an item of 2,256*l.*, being a composition of 15*s.* in the pound on a debt paid by *Johnston* and Co. to the assignees of *George Stokes*, being one of the debts included in the assignment of 1807.

In December 1831 *Edwin Pemberton* petitioned, praying that certain sums, by the commissioners' report found part of the estate of *Pemberton* and *Stokes* and of *George Stokes* and *Thomas Stokes*, in the hands of the assignees of *George Stokes*, together with the accumulated interest thereon, might be paid to the petitioner, and that the assignees might get in and pay over to petitioner all other sums to which he was entitled.

The petitions now before the Court of Review were two: the one by *Edwin Pemberton*, for payment to him of the sums found due by the commissioners, and for an account of the interest and profits made by the assignees of *George Stokes*; and a cross petition by the assignees, that it might be referred back to the commissioner to ascertain what of the property was in the order and disposition of *George Stokes* at his bankruptcy.

Mr. *Swanston*, with whom was Mr. *Montagu*, having opened the petition of *Pemberton*, the Court called on Mr. *Spence* to proceed.

Mr. *Spence* and Mr. *Duckworth* for the cross petition *ex parte Hancox*.—The Lord Chancellor could not, nor can this Court, make the order now asked by the other side; besides which, the order of the Lord Chancellor makes no reference to the question of order and disposition, and this Court cannot alter or add to the Lord Chancellor's orders. The question of order and disposition must have been mooted before the Lord Chancellor; a fact which is tolerably clear,

1836.

—  
*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

March 12,  
1835.



1836.

—  
*Ex parte*  
 PEMBERTON  
 and  
*ex parte*  
 HANCOX.  
 In the matter  
 of  
 STOKES.

from the circumstance that Sir *Edward Sugden's* brief has a note as to order and disposition as part of his argument. [The CHIEF JUDGE:—Did the Lord Chancellor mean to include debts?] It is submitted it cannot here be decided what his Lordship intended; it is enough to say, it does not so appear in the order. The order then excludes any question of order and disposition, — a point which might have been included at the time.

The CHIEF JUDGE:—A question was, whether 2,256*l* was joint or separate estate. A petition was presented to the Vice-Chancellor claiming it for the joint estate. The Vice-Chancellor directed an inquiry by the commissioners, who were to ascertain what money came to the hands of the assignees which bore the character of joint or separate. The proper course was, not to enter into the question of reputed ownership in the first instance, but, as was done, to go before the commissioners to decide what was joint and what was separate. The other question was left open, and the parties may now discuss the question of reputed ownership.

Petition to stand over for further argument.

April 28,  
 29, & 30.  
 1836.

On these days the arguments were continued.

Mr. *Swanston*, Mr. *Montagu*, and Mr. *G. L. Russell*:—

The money in question is either part of the separate estate of *George Stokes*, or it was in his reputed ownership. In *ex parte Williams* (a) Lord *Eldon* says, "Where the possession of the property is delivered over to the surviving partner, and he goes into the world as a sole

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(a) *Ex parte Williams*, 11 *Ves.* 5.



partner, he has all the credit belonging to him as such sole trader, having the possession, and dealing with mankind as such." In *ex parte Dale* (a), a trustee for sale of a brewhouse and plant, the *cestui que trusts*, being infants, contracted to sell them, and let the purchaser into possession; on the bankruptcy of the purchaser the property was held to have been in his reputed ownership, and passed to his assignees without being subject to any lien for the purchase money. In *Holroyd v. Gwynne* (b), standing timber was sold to a trader, with a proviso, that in case of bankruptcy the vendor might retake it if the purchase money was unpaid; but it was held that the proviso was altogether void, and that the goods, being in the order and disposition of the bankrupt, would pass to his assignees. In another case, A., the dormant partner of B., allowed, on the dissolution of the partnership by effluxion of time, the partnership stock, effects, and debts to remain in the order and disposition of B., who, after carrying on the trade for two years on his own account, became bankrupt; and it was held that A.'s share of the partnership property, and of the debts due to the partnership at the time of the dissolution, were in the reputed ownership of B.; *ex parte Enderby*. (c) Again, in *Clarke v. Crownshaw* (d), a lessee of a mill and iron forge conveyed his interest to a creditor, on trust, if default should be made by the lessee in paying certain instalments, to enter and sell, and pay himself out of the proceeds. The lessee made default, and became bankrupt, and the creditor

1836.

*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

(a) *Ex parte Dale*, Buck, 365. nom. in *re Gilpin*, 3 D. & R.  
(b) *Holroyd v. Gwynne*, 7 Taunt. 636. And see *ex parte Wilson*,  
176. S. C. 1 Rose, 113. Buck, 48.  
(c) *Ex parte Enderby re Gil-* (d) *Clarke v. Crownshaw*, 3 Barn.  
*pin*, 2 Barn. & Cres. 389. S. C. & Adol. 804.



1836.

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*Ex parte*  
**PEMBERTON**  
 and  
*ex parte*  
**HANCOX.**  
 In the matter  
 of  
**STOKES.**

then entered, but the property was held in the reputed ownership of the lessee: that case very strongly resembles the present.

The debts and other personalty were assigned to *George* and *Thomas Stokes*, the continuing partners; a power of attorney was also given, together with notice to the debtors of the old firm of the assignment of their debts to *George* and *Thomas Stokes*; when, therefore, *Thomas Stokes* had assigned his interest to *George Stokes*, and the latter became bankrupt, the debts, &c. were in the reputed ownership of *George Stokes*, as in the bankruptcy of *Coward* and *Fear*. (a)

If *George Stokes* was the true owner, the assignees are entitled to the property on that ground; and it is contended, *George Stokes* was so far true owner that if he had not failed in payment of the instalments the petitioner could not interfere with his possession: but the *Pembertons* must have been owners of that interest (whatever it was), which depended on *Stokes* failing in payment, and under which the petitioner now claims: if the petitioner had any kind of ownership or interest, he “consented” that such ownership or interest should be in the reputed ownership of *George Stokes*; if he had no such interest, it was *G. Stokes’s* absolutely. The rights of the parties arise out of a contract, and if under that the bankrupt had a possession which the *Pembertons* could not disturb at the bankruptcy, were not the goods either his absolutely or in his order and disposition? Could he

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(a) In *ex parte Hare, re Coward* firm; 1 *Deacon*, 16. In our report, *ante*, 498, it is reported to have been held to have been actually converted into partnership property, and, *ut semble*, not to have been in the reputed ownership of the ship.



not “order and dispose” of the property in question? Section 79. of 6 Geo. 4. c. 16. relates to pure trust property, where the trustee has the legal but not the beneficial interest, and must be confined to mere trustees, and not extended to trustees having a beneficial interest or ownership; thus a mortgagee, with a restriction as to re-entry, is a trustee, but is within section 72, and not within section 79. Cases where a trust did not originally exist, but are superinduced, are not within section 79. [Sir John Cross: — Is not the legal interest in the debts still in *Pemberton* and *Stokes*; and are not all the interests now before the Court mere equitable interests? Could the assignees of *Stokes* alone bring actions? The power of attorney only gives authority to sue in the names of all.] The same circumstances exist in every partnership where one assigns his share in the partnership to the other; but that does not prevent reputed ownership, or order and disposition.

1836.

—  
*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

Mr. *Spence* and Mr. *Duckworth*, *contra*: — We represent, not the reputed, but the true owners of the property, who were in possession at the bankruptcy. To bring property within the reputed ownership, it is necessary that the real ownership should be in one person, while the reputed ownership is in another, as in *ex parte Watkins*. (a) If the party had a right to enter, but did not exercise that right, it might be open to the other side to contend that reputed ownership was thereby let in; but in this case there was no default before the bankruptcy. (b) In *Clarke v. Crownshaw* (c) there was default before the bankruptcy. Where a party is unable

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(a) *Ex parte Watkins*, 1 Mont. & Agr. 685; reversed, *ante*, 348.

(b) This was a mistake. See *post*, page 559.

(c) *Clarke v. Crownshaw*, 3 Barn. & Adol. 804.



1836.

—  
*Ex parte*  
 PEMBERTON  
 and  
*ex parte*  
 HANCOX.  
 In the matter  
 of.  
 STOKES.

to take possession before the bankruptcy, the goods being in the bankrupt's possession does not place them in his reputed ownership: thus in the case of a mortgage of a ship at sea, delivery of the bill of sale was always sufficient to prevent reputed ownership. *Brown v. Heathcote.* (a)

Mr. *Montagu* in reply — (Mr. *Swanston* being out of court): — The dominion which *George Stokes* had at the moment of bankruptcy was a qualified ownership, and the questions turns on the nature of that qualification. If a debtor had been asked “whose debtor are you?” he would have answered, “*George Stokes's*; I have had notice of an assignment to him.” The case of *Horn v. Baker* (b) is nearest to the present, and there all the cases touching the point now before the Court are collected and fully commented upon. In *Horn v. Baker* (b) A., B., and C. were partners and distillers; they occupied certain premises leased to A. and another; the partnership was dissolved, and by deed A. withdrew, and it was agreed that C. together with J. should carry on the trade and use the premises and utensils, in consideration of an annuity to be paid by C. and J. to A. and his wife, and there was a proviso for re-entry by A., if the annuity was two months in arrear; C. and J. took possession accordingly, and the annuity fell into arrear more than two months. The widow of A. (who was dead) did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J.; and it was held that the vats and other utensils, not fixtures, passed to the assignees, as having been, to the eye of the world, in the possession, order, and disposition of the bankrupts as reputed owners. In the pre-

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(a) *Brown v. Heathcote*, 1 *Atk.* 160.

(b) *Horn v. Baker*, 9 *East*, 215.



sent case the deed was in 1807, the first failure of payment of an instalment in 1814, and the re-entry was not till 1826. This great delay bars the party of any right, even if any existed.

1836.

—  
*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.

In the matter  
of  
STOKES.

The CHIEF JUDGE:—The question is, whether the petitioners can treat *Johnston's* debt, or the money received by the assignees, as part of the joint estate of *Pemberton* and *Stokes*, or whether it is the estate of *George Stokes*? If it were part of the joint estate, then the order of the Lord Chancellor makes it subject to the sums mentioned in the petition as due to the petitioner. The assignees contend no lien existed, because *Johnston's* debt was either the actual property of *George Stokes*, or if not, was in his reputed ownership. It appears to me that the question of reputed ownership, or of order and disposition, does not arise here. The debt, originally due to *Pemberton* and *Stokes*, was assigned to *George* and *Thomas Stokes* by the deed of 1807, and notice of this assignment was given to the debtors; consequently, according to all the cases, every thing was done which was tantamount to a delivery of a chattel; consequently, just before the bankruptcy of *George Stokes*, he might have demanded payment from the debtor (*Johnston*), he therefore fairly had the "order and disposition." But to bring him within the 72d section the power of order and disposition must exist elsewhere than in the true owner; so that the real and apparent rights are different. Here *George Stokes*, being the true owner, was not within the mischief of the 72d section; he was real owner, subject to a condition apparent on the face of the deed. By that deed *George* and *Thomas Stokes* were to sell and apply part of the proceeds in payment of the debt of 49,600*l.* There was also a clause, that on default of payment for sixty days



1836.

—  
*Ex parte*  
**PEMBERTON**  
 and  
*ex parte*  
**HANCOX.**  
 In the matter  
 of  
**STOKES.**

the executors might re-enter, and consider the deed as void. Subject to this condition the debt was assigned to *Stokes*, the bankrupt. The petitioners were not mortgagees; if so, they would have been, according to the cases, the true owners. *George Stokes* was the real owner, subject to be called on to re-assign. After the bankruptcy the instalments fell into arrear, whereon the petitioner re-entered; then the rights under the deed re-attached. The assignees took subject to the same liabilities as the bankrupt; consequently the petitioners are entitled to have the money taken into account as the joint property of *Pemberton* and *Stokes*, and then, under Lord *Lyndhurst's* order, it becomes liable to pay the 49,600*l*.

Sir *John Cross*: — I concur in thinking this not a question of reputed ownership or of order and disposition. In *Williams's* case (a) it was decided, that property assigned sixteen months previous to bankruptcy could not be followed by the creditors of the firm, because it had been absolutely transferred. The principle of *Horn v. Baker* (b) does not touch this case; there the outgoing partners were the owners, and leased to the remaining and some new partners. The great question was, whether the stills were in possession of the bankrupts with permission of the true owners; there could be no doubt of the affirmative as to the moveables.

Sir *George Rose*: — The case turns entirely on the deed. The Vice Chancellor's order, followed up by Lord *Lyndhurst*, goes far to intimate their opinion that order and disposition was excluded. The case of *ex*

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(a) *Ex parte Williams*, 11 *Ves.* 3.

(b) *Horn v. Baker*, 9 *East*, 215.



*parte Dale* (a) was of a trustee to sell, and in such case nothing beyond the legal interest is considered. Where outgoing partners assign property to the continuing partners, it becomes the property of the latter, and creditors are bound by the assignment, and have no lien on the property; nor will it alter the case that the continuing partners undertake to pay the debts. If the deed be one by which the property is not absolutely assigned, as a covenant to assign, and there be any thing executory, the Court will fasten thereon to make the equity of the creditors available. I was therefore anxious to know if there had been any breach in payment of the instalments before the bankruptcy. (b) The right of the respondents has been rested on reputed ownership, or order and disposition, and on real ownership. It makes no difference whether the bankrupt were real or reputed owner, if his possession were fixed with a trust. Now if any instalment remained unpaid for thirty days, a right of entry arose in the nature of a distress at common law; so far all is free from trusts. The difficulty arises from subsequent clauses, by which if the instalment remains sixty days in arrear, *George and Thomas Stokes* became the owners in trust for the executors, and engaged to re-transfer to or in favour of them. If the debts had been recovered before the bankruptcy, then, whether distinguishable or not, they would have become part of the bankrupt's estate, and no lien could have attached; but the money was received after the bankruptcy, and then the assignees cannot retain money received after the breach of the payment of the instalments.

It having been discovered that default in payment of the instalments had taken place before the bankruptcy, this petition came on again for rehearing.

1836.

—  
*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

Jan. 30,  
Feb. 1,  
1836.

(a) *Ex parte Dale*, Buck, 365.

(b) See *infra*.



1836.

*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

Mr. *Swanston* and Mr. *G. L. Russell* for the assignees, the petitioners in the first petition: — The Court is now called upon to review its judgment on the point of reputed ownership, as it has been discovered that there was default before the bankruptcy of *George Stokes* in payment of instalments under the deed. As the default occurred before bankruptcy, the proviso in the deed for re-entry came into effect, and then the *Pembertons* became the owners; and if *George Stokes* was afterwards in possession, it was with consent of the true owners. The mere existence of a trust does not in such cases exclude reputed ownership, as was lately decided in *ex parte Watkins*. (a) This is a case of a security given for a debt; and all the mischief intended to be excluded by 6 Geo. 4. c. 16. sect. 72. will be let in, if the personal representatives of the *Pembertons* are allowed to take this money otherwise than in dividend. If the *Pembertons* had a lien only, or a right of re-entry only, then of that lien or right of re-entry *George Stokes* was reputed owner.

Mr. *Spence* and Mr. *Duckworth*, for the representatives of *Pemberton*, were stopped by the Court.

The CHIEF JUDGE: — This discussion has arisen upon the principle, that if the instalments were in arrear for sixty days previous to the bankruptcy, the former decision of this Court on the point would have been different. I am of opinion the case is left precisely where it was on the last decision.

Sir *John Cross*: — Is it admitted that the fact has been established? (Which Mr. *Spence* does not admit.)

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(a) *Ex parte Watkins*, 1 Mont. & Ayr. 685. Reversed, ante, 548.



When it is, I will say whether I alter my former opinion or not, this question creating the only difficulty.

1836.

*Ex parte*  
PEMBERTON  
and  
*ex parte*  
HANCOX.  
In the matter  
of  
STOKES.

Sir *George Rose* : — The Court is here on the assumption of the fact of the default before the bankruptcy: on that assumption I proceed. The *Pembertons* were no parties to the alteration of the ownership of the property by *J. and G. Stokes*; and where is the “consent” of the *Pembertons* to the possession of *George Stokes* alone? The contract of the *Pembertons* was with *Thomas and George Stokes*. The charge in the deed was intended to protect the rights of the *Pembertons*, —not to destroy it. The case of reputed ownership is between the creditors of *Thomas and George*: a question which does not arise. I concur with the Chief Judge that the former decision was correct. As to *ex parte Burwood (a)*, I think the notice to the office, as stated in the report, was not sufficient to prevent reputed ownership. I had thought the notice had been given by the party himself.

*Cur.*: — As to the first point, the order stands as before.

The report was confirmed as to the debt in question, thus excluding the reputed ownership.

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(a) *Ex parte Burwood*, ante, 384; nom. *ex parte Watkins*.



C. of R.  
Nov. 5,  
1835.  
Feb. 1,  
1836.

A. and B.  
were trustees;  
A. misapplied  
the trust funds,  
and a commis-  
sion issued  
against him,  
under which he  
obtained his  
certificate; no  
proof was made,  
as he concealed  
the fact, and  
continued to pay  
the interest;  
afterwards a fiat  
issued against  
him, after which  
the breach of  
trust was dis-  
covered: Held,  
the certificate  
under the com-  
mission was a  
bar to any proof  
under the fiat.

*Ex parte* HOLT.—In the matter of MAKIN.

THIS was the petition of several infants, by their next friend, to prove.

*Grace Cherry* by her will bequeathed all the residue of her estates to *Makin* (the bankrupt) and *Sutton* (who were partners), and who both proved the will, in trust to convert the same into money, and invest it upon mortgage securities, and pay the interest of one moiety to *Phæbe Cherry*, and of the other moiety to *George Cherry*, and in case of the death of either to pay the interest to the survivor, and the property on the death of the survivor to go to the children. *George Cherry* died an infant, and *Phæbe* married *Holt*, the petitioner. *Sutton* and *Makin*, the trustees, converted the property into money; but, instead of investing it, as directed, in mortgage securities, employed it (unknown to the *cestuis que* trust) in their business, paying the interest in the meantime into the hands of *Phæbe Leach*. In 1818 the partnership between *Sutton* and *Makin* was dissolved, and the money left in the hands of *Makin*, who became bankrupt in 1830, and obtained his certificate. No proof of this debt was made, but he paid the interest to *Phæbe Leach* till 1834. In 1834 a joint fiat issued against *Makin* and his then partners, under which *Makin* obtained his certificate. Since the last fiat *Makin* continued to pay the interest, and the petitioners only lately discovered that the money had not been invested. They then attempted to prove for the principal (800*l.*), or so much of the dividend as *Makin* might have received if he had proved under the first bankruptcy; but the proof was rejected by the commissioners.



This was a petition to prove either the whole sum or the amount of the dividends which would have been received under the first commission if the proof had been then made. The mother of the children was dead, and the petitioner claimed to have the money which he might recover from the assignees distributed among them.

1836.

—  
*Ex parte*  
HOLT.

In the matter  
of  
MAKIN.

Mr. *Swanston* and Mr. *Booth* for the petition: — The number of years which has elapsed will not prevent the proof, this being a case of fraud, and consequently the debt is not barred by the statute of limitations. In the *South Sea Company v. Wymondsell* (a) it was held that the statute of limitations was no bar in cases of fraud; and *Hovenden v. Lord Annesley* (b) decided in case of fraud the statute only ran from the time of the discovery of the fraud; and as the bankrupt prevented this debt from being proved by a fraud in concealing the facts, that fraud, which furnishes an exception to all rules, prevents this debt being barred by the certificate. Suppose, instead of a second bankruptcy, a bill had been filed against *Makin*, calling on him to account as trustee, he could not set up his certificate, as his defence then must be inequitable, viz. that though the debt, if known, would have been proveable, yet that his default in concealing it prevented the proof. If the parties had proved they would have had a vote as to the certificate, and *non constat* the bankrupt would never have obtained it. [The CHIEF JUDGE: — Would not that be ground to set aside the certificate?] In any event there is a right to prove for the amount of

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(a) *South Sea Company v. Wymondsell*, 1 P. Wms. 143.

(b) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 663.



1836. dividends which would have been payable under the first commission if proof had been made thereunder.

—  
*Ex parte*  
HOLT.

In the matter  
of  
MAKIN.

Mr. *Heathfield* for the assignees: — The judgment in this case must be governed by the bankrupt laws, — not by any general principles of equity. The answer to this petition is, that the debt was proveable under the first commission, and therefore barred by the certificate, by 6 G. 4. c. 16. s. 121., which enacts, “the bankrupt shall be thereby discharged from all claims and demands thereby made proveable.” The certificated bankrupt is trusted by third parties as a new man; and it is their privilege, as well as the bankrupt’s, that the order asked should not be made. In *South Sea Company v. Wymondsell* (a) it was merely decided that the statute of limitations was not a good plea; but the defendant was put to answer, reserving to him the benefit of the objection. If the time of discovery of the fraud can have any effect, that was not till after the fiat of 1834. When *Makin* became bankrupt, the parties ought to have inquired whether he had the trust funds in his hands, and might have had a new trustee appointed; they would then have discovered the fraud; their not having done so is their own laches. The bankrupt could not have proved without an order, *ex parte Moody* (b), *ex parte Shaw* (c), which is conclusive that his not doing so is no breach of trust.

Mr. *Swanston* in reply: — Where one trustee receives all the trust fund, he alone may be charged in equity,

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(a) *South Sea Company v. Wymondsell*, 1 P. Wms. 143.

(b) *Ex parte Moody*, 2 Rose, 413.

(c) *Ex parte Shaw*, 1 Gl. & J. 127.



*Walker v. Symonds* (a); which case went to the House of Lords. The fraudulent concealment differs this case from all others. Till the *cestui que* trust demands the trust fund from the trustee no debt is due from the trustee. In this case no demand was made till the fraud was discovered. (b)

1836.

*Ex parte*  
HOLT.  
In the matter  
of  
MAKIN.

The CHIEF JUDGE:—At present there appears to me insurmountable difficulty in ordering what the petition asks, though the payment of the interest and natural equity are in favour of the demand. But one great obstacle to the proof is the interest of the new creditors, who have trusted the bankrupt on the faith of his certificate. My opinion now is, that as the debt might have been proved it is barred by the certificate; and though the bankrupt might have revived the debt (c) it does not appear that he ever did. The payment of interest was an admission that he had the money, and not that he had misapplied it; or it might have been paid from a sense of justice,—not denying the misappropriation. It is therefore an equivocal act. It seems to me, that in fact the misapplication was before the first commission; but as I am anxious to allow the proof, if possible, I will take time to consider my judgment. At the time of the bankruptcy the *cestuis que* trust had an election to treat the debt as joint or several: they never have treated it as the separate debt of *Makin*.

Sir John Cross:—I agree as to what natural equity and common honesty demands. The interest was paid

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(a) *Walker v. Symonds*, 3 Swan. 58.

(b) That was not till *after* the fiat of 1834.

(c) 6 Geo. 4. c. 16. s. 131.



1836.

—  
*Ex parte*  
 HOLT.

In the matter  
 of  
 MAKIN.

before the first commission, and after the first commission. If a trustee holds out to his *cestui que* trust that he still possesses his money, and he thereon forbears to prove, I have an impression that the trustee is precluded from subsequently declaring, "I was not then a trustee; I had no trust money; I was deluding you." But I will consider my judgment.

Sir *George Rose*: — I am anxious to assist the petitioners, but I do not perceive how it can be done. When the breach of trust took place the petitioners had an election to consider the debt as joint or separate. The question is, when the first commission issued, did any debt exist, legal or equitable, which by election or otherwise could have been proved? if so, if there were any debt proveable at and before the date and issuing of the fiat, can it be disputed that it is barred by the certificate? Whether the certificate protects or not in cases of *devastavit* is not the question in this Court, which can only treat the matter as one of debtor and creditor, as a question of account or balance. It was as much the duty of the other trustee to have proved as of *Makin*; and the question of how far the other trustee is liable is still open to the parties. In bankruptcy it is impossible to hold that the misconduct of the bankrupt as trustee, and before his bankruptcy, can create a claim against him as a debtor after his bankruptcy.

*Curia advisare vult.*

Feb. 1.

This day judgment was delivered.

The CHIEF JUDGE.—In this case the petitioner claims to prove, as the next friend of some infants, the children of *Robert* and *Phæbe Holt*, a sum of money against the estate of the bankrupt. [His Honor here detailed the



facts of the case as stated before, and proceeded:] The petitioner contends, first, that because *Makin* had paid the interest he had thereby sufficiently acknowledged the debt, so as to create fresh liability; and that therefore they had a right to presume, for the purposes of justice, a promise, and were entitled to prove for the whole. This Court cannot assume any promise was made, because the statute (a) requires it to be in writing, and therefore no presumption arises from the mere circumstance of his having paid interest. But then it is said, that the payment of interest is an acknowledgment of his having property in his hands, and that therefore we might presume that the property was all the time at interest somewhere or other, and never was used before the first commission; but, upon a full consideration of the case, the Court cannot arrive at that conclusion; all the facts upon the petition seem to rebut that presumption, and go to show that the trust property had been dissipated at the time of the first bankruptcy; and therefore the act of paying interest was so equivocal an act, and possibly merely arose from a feeling of moral justice, that no presumption can arise from that circumstance. It was put to the parties whether it was worth while to take a reference upon that point, and declined. I am therefore of opinion that we cannot direct the proof of the whole of the debt. It was further contended, that as *Makin* was a trustee he was bound to have proved under his own commission, when he would have received a considerable dividend; for it appears a considerable sum is forthcoming under the commission. But it is not clear that *Sutton*, the other trustee, is dead; and *Makin* could not have proved against his own estate without an order from the Court.

1836.

—  
*Ex parte*  
HOLT.

In the matter  
of  
MAKIN.

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(a) 6 Geo. 4. c. 16. s. 131.



1836.

*Ex parte*  
HOLT.In the matter  
of  
MAKIN.

We are therefore of opinion, that unless it can be shown that there was any wilful default on the part of *Makin* the proof under the present fiat for what would have been the dividend under the first commission cannot be made. We must follow the rules of law, and not the wishes of the parties. The case of *Walcott v. Hall* (a) decides that you cannot call upon an executor to account for money which might have been proved under his commission, and the parties in that case were infants at the time. I am therefore of opinion that this petition must be dismissed.

Sir *John Cross* and Sir *George Rose* concurred.

Petition dismissed. Assignees costs out of the estate.

C. of R.  
Feb. 1,  
1836.

A loan on bills of three months, on which more than five per cent. interest is allowed, is not taken out of 3 & 4 W. 4. c. 98. s. 7. by taking collateral security.

*Ex parte* KNIGHT. — In the matter of POWNALL.

THIS was a petition to prove a bill or promissory note, which came under the provision of 3 & 4 W. 4. c. 98. sect. 7.

The petition stated as follows: — That in 1834 and 1835 the petitioner had transactions with the bankrupt in discounting bills and promissory notes, payable at or within three months after date, on which, or the greater part thereof, the petitioner took interest or discount more than 5*l.* per cent. per annum. On the 14th of March 1835 the petitioner discounted three bills for 100*l.* each; two dated the 13th and one the 14th of March 1835, payable, one, two, and three months after date, to

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(a) *Walcott v. Hall*, 2 *Brown*, 305.



the order of the bankrupt, at *Masterman* and Co.'s; and the petitioner retained out of the proceeds 23*l.* 2*s.* 5*d.* for discount, which exceeded legal interest. The petitioner, on the 21st of April 1835, discounted a bill of the bankrupt for 266*l.*, dated the 21st of April 1835, payable three months after date to the order of the bankrupt, and drawn upon Mr. *Coleshill*, payable at *Masterman* and Co.'s, which was indorsed to the petitioner, who retained 4*l.* 1*s.* for discount, stamp, and banker's commission; and, on the 2d of May 1835, discounted a bill of the bankrupt for 450*l.*, dated the 1st of May 1835, payable three months after date, to the order of the bankrupt, at *Masterman* and Co.'s; and the petitioner retained 49*l.* 6*s.* 5*d.* for discount, which exceeded legal interest. All the bills so discounted, except the first bill for 100*l.*, were dishonoured, and were in possession of the petitioner and unpaid.

In February 1834, the petitioner, being in advance in respect of such discounting, applied to the bankrupt for some security for such advances, whereon the bankrupt assigned to the petitioner a policy of insurance, dated July 1833, on the bankrupt's life, for 1,000*l.*, as collateral security for all monies advanced or to be advanced, not exceeding 1,000*l.* Shortly before September 1834 the petitioner, being then in advance 564*l.* to the bankrupt for bills previously discounted, again applied for further security, when the bankrupt, in November and December 1834, deposited with the petitioner two parcels of hops, and delivered to him the following memorandum:

“ Manchester, December 8, 1834.

“ Mr. *James Knight*.

“ Sir,

“ HEREWITH you will receive invoice of ten pockets of hops, delivered to you on the 8th day of November last,

VOL. II.

P P

1836.

—  
*Ex parte*  
KNIGHT.

In the matter  
of  
POWNALL.



1836.

—  
*Ex parte*  
 KNIGHT.  
 In the matter  
 of  
 POWNALL.

marked and numbered, also invoice of sixteen pockets of hops, marked and numbered, and delivered to you this day; all which twenty-six pockets shall be to you as a security for such advances as you have made or may hereafter make in any way of discount of any bill or bills or promissory note or notes, or any other account whatsoever, and for interest and all incidental charges thereon; and in case of my default in payment of the amount which may be owing from me to you for the time being, on demand, you shall be authorized to sell the same pockets of hops, or any of them, either by auction or by private contract, and either for cash or on credit, as you in your discretion shall think fit; and after repayment of your advances, interest, and expences, the surplus, if any, to be, and I further agree that until such sale or sales shall be made the said pockets of hops shall remain, at my risk from fire or otherwise. I hereby agreeing to pay to you rent for warehouse-room; the said rent to be payable in advance half-yearly; and I further agree to be answerable to you for any deficiency of the amount owing by me to you after sale of the before-mentioned pockets of hops.

“ (Signed) JOHN POWNALL.”

In March 1835 the petitioner, being still in advance 500*l.* to the bankrupt, again applied for a further security, and obtained invoices of two parcels of brandy and a parcel of wine, also a bill of lading of one of the parcels of brandy, together with a memorandum similar in effect to the one before mentioned. On the 28th of March 1835 the petitioner obtained an order on some merchants at Liverpool to deliver to the petitioner a parcel of wine value 12*l.* 4*s.* On the 22d of June 1835 a fiat issued against *Pownall*. The various securities were sold by the petitioner after issuing the fiat, with the assent of the assignees. The bills dishonoured



amounted to 916*l*. The net produce of the securities sold amounted to 309*l*. 15*s*. After giving credit for 50*l*. cash received from the bankrupt, and for the produce of the securities (deducting 25*l*. 3*s*. paid on a claim of lien of another party), there remained due 581*l*. 18*s*. to the petitioner, for which, in December 1835, he tendered a proof, which the commissioners rejected, on the ground that the petitioner, by taking the collateral securities, had deprived himself of the protection of the statute; they being of opinion that the statute contemplated such transactions only as were secured by bills or notes alone. The commissioners, however, entertained considerable doubt, and expressed a desire that the opinion of the Court of Review should be taken.

1836.

*Ex parte*  
KNIGHT.

In the matter  
of  
POWELL.

Mr. *Swanston* and Mr. *O. Anderdon* for the petition:—  
The 3 & 4 W. 4. c. 98. sect. 7. enacts, “that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest to be taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, drawing, accepting, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties; any statute or law relating to usury, or any other penalty or forfeiture, or any thing in any law or statute relating to usury, &c. notwithstanding.” To reject this proof would be to nullify this enactment. The only case upon



1836.  
 —  
*Ex parte*  
 KNIGHT.  
 In the matter  
 of  
 POWNALL.

the point is *Connop v. Meaks (a)*, there bills had been given for three months upon usurious terms, and being dishonoured a warrant of attorney was given for the amount, which was contended to be void as being tainted with usury, but it was held good within the statute. In the case before the Court the objection is similar; viz. to a collateral security. It is submitted that *Connop v. Meaks (a)* will govern the decision in the present case.

Mr. *Bethell* and Mr. *Cowling*, *contra*: — The object of the act is to protect bills at a short date, and for payment of which there is mere personal security; and in such cases the legislature has conceived it just that more than five per cent. interest should be allowed for the increased risk. But the statute cannot be extended to loans accompanied with a deposit of goods, the act only extends to loans on bills of exchange of three months. In *Connop v. Meaks (a)* the warrant of attorney was not a collateral security: the security in this case was collateral. A contract of this kind must be construed as entire; one part cannot be good and another bad; the transaction cannot be good as to the notes, and bad as to the goods.

The CHIEF JUDGE: — In *Connop v. Meaks (a)* it was urged, that though the transaction as to the bill was valid, yet that the act did not extend to the warrant of attorney; but the Court held, that if the bill was valid so was the warrant of attorney. In this case, however, the creditor comes to prove on the bill itself, and the act declares that the liability of any party “shall not be affected.” It has been argued, that the whole transaction must stand or fall together; but that is not the

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(a) *Connop v. Meaks*, 2 *Adol. & Ellis*, 326.



case; the bill may be available, though the security is not. The objection here is, that the party has a collateral security by deposit of goods on a transaction tainted with usury. Now the question is not, whether the deposit is or is not protected by the act. The point for the Court to decide is this: can a proof on a bill, declared valid by act of parliament, be rejected by reason of a collateral security said not to be so protected? If we reject this proof on the ground of usury, will not the party be "affected" thereby contrary to the words of the act? That difficulty appears to me insurmountable. It would indeed have been reasonable had the act not included such transactions as the present, where the bill is accompanied by a security, but such has not been done. The decision of this Court, allowing the proof, will not prevent the parties contesting the validity of the deposit.

1836.

*Ex parte*  
KNIGHT.

In the matter  
of  
POWNALL.

Sir *John Cross*: — The statute in question does not repeal any of the laws relating to usury; it merely exempts a particular class of bills of exchange from the operation of those laws; and the sole question here is, do the parties bring their case within the statute? The intent of the legislature was to allow more than five per cent. in case of loans on particular bills of exchange only. The words "interest to be taken thereon" mean on bills alone, and the words "secured thereby" mean secured by such bills, and not by any thing else. This was a contract to lend money on bill, and also on a deposit of goods. In *Connop v. Meaks* (a) the warrant of attorney was not given at the same time with the bills. But for the contrary opinion of the other judges I should not feel the slightest hesitation as to my being right in declaring that I think the transaction usurious,

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(a) *Connop v. Meaks*, 2 *Adol. & Ellis*, 326.



1836.

—  
*Ex parte*  
 KNIGHT.  
 In the matter  
 of  
 POWNALL.

and not protected by the statute, and that the commissioners were right in rejecting the proof.

*Sir George Rose* : — This appears to me a plain case. If the bills of exchange were merely given colourably to protect a usurious transaction, the proof ought to be rejected; but there is no evidence before the Court that such is the fact. Would the party be entitled to maintain an action on the bill? If he would he must be allowed to prove. It may be different if on a similar transaction a party comes here petitioning for sale of property deposited as security. In this case the security is sold and the proceeds realized without the assistance of the Court. If, however, the assignees conceive that the pledge of the property is not protected by the statute, they may apply to the Court to retain the dividends for a reasonable time, to enable them to try the question at law, but the proof on the bills must be allowed.

Proof ordered. No costs to the petitioner; assignees' costs out of the estate.

C. of R.  
 March 8,  
 1836.

*Ex parte* FIFE. — In the matter of PHIBBS.

If the allegation in a petition to stay the certificate is positive, while the affidavit in support by the petitioner states "information and belief" only, but another affidavit in support by a third person states the fact positively, it is sufficient.

THIS was the petition of *Henry Fife* and *Robert Green*, wine merchants.

The petition stated, "that the bankrupt lost 20*l.* and upwards in one day by gaming, (that is to say,) on the 18th day of June now last past, by gaming at a certain game called rouge et noir, at a gaming-house, No. 10, King Street, St. James's."



The affidavit in support by *Henry Fife* stated, " that deponent hath been informed (and which information deponent believes to be true) that in one day, namely, on Thursday the 18th day of June now last past, *George Phibbs* lost the sum of 30*l.* and upwards by gaming at a certain game of rouge et noir."

1836.

*Ex parte*  
FIFE.

In the matter  
of  
PHIBBS.

Mr. *John Morris* also made an affidavit in support, which stated, " that on Thursday the 18th day of June last he, this deponent, went to the house, No. 10, King Street, Saint James's, in the city of Westminster, then kept, as this deponent believes, as a common gaming-house; and that he, this deponent, in a room of the first floor of the said house, then saw *George Phibbs* there engaged in playing at a certain game called rouge et noir; that *George Phibbs* then staked sums of money from 1*l.* to 10*l.*, with various success; and when deponent left said room, which was about the hour of ten o'clock in the evening of said day, he, *George Phibbs*, had on that occasion and at that time lost the sum of 30*l.* and upwards."

In reply the bankrupt deposed, " that he is not nor ever was in the habit of gambling or of frequenting gambling-houses, and he denies most positively that he was engaged in playing at a certain game called rouge et noir or any other game at No. 10, King Street, Saint James's, in the city of Westminster, on the 18th day of June last or any other time; that this deponent never entered the same house in his life." The bankrupt then proceeded to set up an alibi, which was supported by two other witnesses.

The petition was signed "*Henry Fife*, for self and partner;" but the petition did not contain any allegation that they were partners. The attestation was as follows: " Signed by the said *Henry Fife*, in the pre-



1836.

—  
*Ex parte*  
 FIFE.  
 In the matter  
 of  
 PHIBBS.

sence of *D. Davies*, solicitor for the said *Henry Fife* and *Robert Green* in the matter of this petition."

Mr. *Keene* for the petition.

Mr. *J. Russell* and Mr. *Bird*, *contra* : —

There are two objections of form.

1st, This is the petition of two, of whom only one signs; and the petition contains no allegation of the two being partners.

2d, The affidavit in support by *Phibbs* does not positively allege the gambling, but merely that "he was informed and believes." Now all facts must be stated equally in the petition and in the affidavit in support (*a*) filed by the petitioner; and the statement must be positive. Here the petition is positive, but the affidavit in support by *Phibbs* states "information and belief" only; and though *Morris's* affidavit states the fact positively, that is not sufficient; the petitioner must himself swear to the fact positively. But even the affidavit of *Morris* is not sufficient; it does not state in precise terms that the bankrupt "lost 20*l.* in one day," which is absolutely necessary. (*b*)

Mr. *Keene* in reply : — The petition is signed "for self and partner," which is sufficient. (*c*) The petition states the fact of gaming positively, and the affidavit in support by *Morris* supports the allegation of the petition; and it is not necessary that the petitioner should make the affidavit in support; any person may do so. As to the bankrupt's denial, it is insuf-

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(*a*) See *ex parte Cundall*, 1 *Gl. & J.* 38.

(*b*) *Ex parte Crouch*, 3 *Dea. & Ch.* 17.

(*c*) Lord *Eldon's* order, Aug. 12, 1809.



ficient; he states he never was at "No. 10." Now it is a common trick to change numbers for fraudulent purposes, and he does not venture to swear that he did not play "at No. 10. or any other place."

1836.

*Ex parte*  
FIFE.

In the matter  
of  
PHIBBS.

The CHIEF JUDGE:—The objection as to the partners is not valid. The allegations of this petition are sufficient if supported by affidavit. The affidavits in support are two; that by the petitioner merely states "information and belief," which is insufficient; but that by Mr. *Morris* is positive in its terms. The affidavit in reply by the bankrupt positively denies gaming at "No. 10," but he does not deny that he lost 20*l*. that day elsewhere; and these gaming-houses continually change their numbers, to the disappointment of prosecutors. The bankrupt's affidavit in answer is a mere *verbatim* denial; he there sets up an *alibi*, which is supported by two witnesses, and denied by five others. As to this, the Court think that if the bankrupt wishes it he is entitled to an issue.

A petition by partners to stay the certificate, signed "for self and partners," is enough, though there is no allegation in the petition of the partnership.

Sir *John Cross* and Sir *George Rose* concurred.

*Per Curiam*:—Let there be an issue, to be tried in this Court on the 5th of June next, whether the bankrupt lost 20*l*. on the 18th of June last by wagering or gaming, the petitioner being plaintiff; the bankrupt, the petitioner, and all parties making affidavits, to be examined; the petition to stand over in the meanwhile. Let the bankrupt have the conduct of the order, to prevent delay, and give liberty to the petitioner to apply.

Mr. *J. Russell*:—Suppose the petitioner sets up any other case of gaming than that which is stated now?

On an issue ordered, whether the bankrupt



lost 20*l.* on a particular day, evidence cannot be given of gaming on another day.

*Per Curiam* : — In such case produce the affidavits now filed, which will defeat any such attempt. The Court orders an issue as to the matters now in dispute here; not otherwise.

The issue was not tried, as the petitioner did not appear. It was stated he was satisfied that he had made a mistake as to the identity of the bankrupt.

C. of R.  
March 9,  
1836.

A notice of motion to vary minutes does not prevent their being drawn up.

*Ex parte* BELL. — In the matter of BROWN.

MR. SWANSTON and Mr. Koe appeared on a motion to vary the minutes, to which Mr. Temple objected that the order was drawn up. Mr. Swanston urged it was drawn up after notice of this motion.

*Per Curiam* : — The rule is, the minutes cannot be varied after the order is drawn; nor does a notice of motion to vary minutes stop drawing up the order.

Mr. Temple, however, subsequently waived the objection.

C. of R.  
March 10,  
& May 3,  
1836.

An item for attending a mortgagee summoned to attend before a commissioner, makes the whole bill taxable.

*Ex parte* WILLIAMS. — In the matter of WEBB.

MR. WILLIAMS was a creditor of the bankrupt, and as security for his debt held a mortgage. He did not come in under the fiat, but stood upon his security. He was summoned before Mr. Commissioner Williams to be examined touching his mortgage, and on that occasion was attended by his solicitor.



The solicitor subsequently sent in a large bill for conveyancing and other business done for the petitioner, which contained an item for the attendance before Mr. Commissioner *Williams*, which was the only item in the bill for business done in bankruptcy. There were no other items in the bill which were taxable in any court.

1836.

—  
*Ex parte*  
WILLIAMS.  
In the matter  
of  
WEBB.

Mr. *Swanston* for the petition:—The 2 G. 2. c. 23. s. 23. enacts, that no attorney or solicitor shall maintain any action “for the recovery of any fees, charges, or disbursements at law or in equity” until the expiration of one month after delivery of his bill signed; and in *Collins v. Nicholson* (a) Lord *Mansfield* held that a bill for procuring a bankrupt his certificate was within the act, as “an application must be made to the Chancellor for his signature to the certificate; and it has long been settled, that where a bill contains one item which is a proceeding in court, all the residue of the bill, though it be even a bill merely for conveyancing, is taxable.” Now a fiat in bankruptcy is clearly a proceeding in a court, and any proceeding thereunder is consequently taxable. The jurisdiction to act (which has here been exercised by summoning the creditor) and the jurisdiction to tax must be co-extensive. If Mr. Commissioner *Williams* may summon the party, why cannot the Court tax the costs thereby incurred?

Mr. *Cooper, contra*, for the solicitor:—There is no jurisdiction to tax in this case. The question is, whether a solicitor who attends a party summoned as an outstanding equitable mortgagee to appear and be examined before a commissioner of bankrupts is therefore

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(a) *Collins v. Nicholson*, 2 Taunt. 321. S. C. 1 Rose, 119.



1836.

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*Ex parte*  
 WILLIAMS.  
 In the matter  
 of  
 WEBB.

liable to have his bill taxed in this Court of Bankruptcy, — a bill which consists of conveyancing, and the petitioner not coming in under the bankruptcy, he being in fact a mere witness. The solicitor did not argue before the commissioner; he only advised with his client, as any other friend might have done. If a solicitor charges for business done anterior to a proposed action or suit which never is instituted, or where the solicitor is changed before the suit is instituted, the bill is not taxable.

The CHIEF JUDGE: — This case is attended with considerable difficulty. Doubts seem to have been entertained by other learned judges as to where the court of bankruptcy exists. (a) If this Court have jurisdiction to tax, and an action is brought for the amount of the bill, it could not be left to the jury on a *quantum meruit*, because the court of law would say, that as it was taxable in bankruptcy the amount was not a question for the jury; and thus unless the bill is taxed here it never will be taxed at all. My present impression is, that this Court has jurisdiction to tax. The item in question is for attending before Mr. Commissioner *Williams* on behalf of the equitable mortgagee, who was summoned to attend, and who was not therefore a volunteer, but a witness. But the equitable mortgagee was drawn under the jurisdiction by the summons, and he takes his solicitor with him, and for that attendance the solicitor charges. Now, is not that a charge for business done in the Court of Bankruptcy? If so, it is taxable. The Court will take time, however, before delivering judgment.

Sir *John Cross* would consider of his judgment.

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(a) *Rex v. Faulkner, ante, 311.*



Sir *George Rose* : — I think the Lord Chancellor sitting in bankruptcy would not have had jurisdiction to tax this bill. All matters in bankruptcy which were formerly taxed were so taxed in pursuance of the statute; but the difference now is, that the 1 & 2 W. 4. c. 56. s. 1., and the 5 & 6 W. 4. c. 29. s. 25., have created this a court of law and equity, and have given it the same general jurisdiction over solicitors as any other court. It would be difficult to say that this was not an item of business done in bankruptcy. All acts of the commissioners are under the sanction of being done by a judge of record. It is no doubt a strong objection, that an isolated trifling charge in a bill, and where the party was summoned adversely, should transfer to our jurisdiction all kinds and amounts of charges; it *prima facie* would appear extraordinary that such should be the case; but if, on considering the acts, we find we have jurisdiction, we are compelled to exercise it, however unwillingly. I for one should be glad to withdraw, if possible; for it is difficult to conceive that it could have been intended that this Court should exercise any such jurisdiction.

*Cur. ad. vult.*

This day Mr. *Cooper* asked judgment.

*Per Curiam* : — The Court are of opinion, that the item for business before a commissioner gives this Court jurisdiction, and that the taxation must be ordered.

Taxation ordered.

1836.

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*Ex parte*  
WILLIAMS.  
In the matter  
of  
WEBB.

May 3.



C. of R.  
March 10  
& 11,  
1836.

The solicitor to the petitioning creditor may petition that the assignees may pay him the amount of the petitioning creditor's costs.  
*Cross dis.*

*Ex parte* BENSON. — In the matter of TAY.

THIS was a petition by the solicitor to the petitioning creditor for payment of the petitioning creditor's bill up to the choice of assignees.

Mr. *E. Chitty* for the petition.

Mr. *N. Ellison*, for the assignees, objected, that the petitioning creditor himself, and not his solicitor, ought to have presented the petition. The 6 Geo. 4. c. 16. s. 14. enacts, "that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission." {In *ex parte Haynes* (a) Sir *John Leach* expressly decided that the petitioning creditor, and not his solicitor, must petition for the costs prior to the choice of assignees, which case is cited by the Chief Judge in *ex parte Coates* (b), without any disapprobation. [The CHIEF JUDGE: — I merely said that it did not affect the question there.]

The CHIEF JUDGE: — The practice before Sir *John Leach*, of requiring the petitioning creditor to apply, has long been altered. The solicitor to the petitioning creditor himself does all the work, and advances all the

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(a) *Ex parte Haynes*, 2 Gl. & J. 35.

(b) *Ex parte Coates*, ante, 332.



money required out of his own pocket, and he presents his bill; therefore, in fair practice, the costs are justly due to the solicitor. But then the act of parliament enacts that payment shall be made to the petitioning creditor; so that if the solicitor were to bring an action for the amount of the petitioning creditor's costs, it would be a good defence that there was no contract by the assignees to pay the solicitor, and that the money was in their hands payable to the petitioning creditor. Here the money is in the hands of the assignees on account of the claim, and the only possible difficulty in this Court is that suggested by Sir *John Leach* in *ex parte Haynes (a)*, viz. that perhaps the petitioning creditor may already have been paid. The assignees, however, do not set up that defence. The utmost that I can do here is to allow the petition to stand over, with liberty to make the petitioning creditor a party to the petition; but I think the assignees would not be wise to insist upon that. Then are the assignees bound to retain the costs in question till the petitioning creditor comes to demand them? Not so; the solicitor would have a lien on the costs. The order ought to be made for payment to the petitioner of the amount of the costs, or of such sum as the assignees have got in under the fiat.

1836.

*Ex parte*  
BENSON.

In the matter  
of  
TAY.

Sir *John Cross* : — This decision may be considered as ruling that the solicitor to the petitioning creditor has a right to insist upon payment from the assignees; a rule which would be contrary to the principles of law and to former decisions, so far as I have been able to ascertain. The petitioning creditor brings forward his bill of costs at the choice of assignees, which the com-

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(a) *Ex parte Haynes*, 2 Gl. & J. 35.



1836.

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*Ex parte*  
BENSON.  
In the matter  
of  
TAY.

missioners allow, and order to be paid to the petitioning creditor; to him, therefore, the right belongs of being paid, and not to his solicitor, who consequently has legal right to demand the amount. In *Burwood v. Felton* (a) it was held, that the messenger could not maintain an action against the assignees for his fees previous to the choice; and in *ex parte Haynes* (b) it was expressly decided by Sir *John Leach*, that the petitioning creditor, and not the solicitor, must apply for the petitioning creditor's costs; and there is good reason for this; the petitioning creditor is satisfied with the posture of affairs, or may wish to give time to the assignees; this is at his peril; for if he does not pay the solicitor's bill, the solicitor may bring an action against him: *non constat* but that the solicitor has already been paid by the petitioning creditor. It therefore appears to me that the solicitor has no *locus standi* at law or in equity, and that we have no right to decide otherwise. Perhaps the solicitor has not advanced the monies; perhaps the petitioning creditor advanced the money to the solicitor. Suppose the petitioning creditor has a claim of set-off against the solicitor. If he has, we deprive him of it behind his back. Suppose this petitioning creditor has become bankrupt, who then is entitled? The solicitor, or the assignees of the petitioning creditor? I think the latter. It has been suggested by the Chief Judge that the solicitor has a lien on the money; I am not informed where that doctrine appears. The solicitor does not work on a speculative future fund; he looks to his employer, the petitioning creditor. I therefore cannot adopt the opinion that the solicitor has any lien; but even if he

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(a) *Burwood v. Felton*, 5 *Barn. & Cres.* 43.

(b) *Ex parte Haynes*, 2 *Gl. & J.* 35.



bad, he could not insist thereon in the absence of the petitioning creditor. I can perceive no reason for departing from general principles; and there being no single authority over-ruling *Burwood v. Felton* (a), and *ex parte Haynes* (b), I cannot think that Mr. Ellison's objection is bad.

1836.

*Ex parte*  
BENSON.  
In the matter  
of  
TAY.

Sir George Rose : — The practice before Sir John Leach certainly was as stated in *ex parte Haynes* (b); but it has since been decided the other way over and over again. The words of the act are not conclusive of this question, as the clause is not the only one which is not strictly followed. Practice always modifies. The solicitor is, in fact, the party who actually advances the money up to the choice of assignees, and therefore ought to be the person who actually receives these costs: his work and labour raises an equitable contract in his favour. The objection (which the assignees, very properly, have not pressed) is purely a technical point of pleading, viz. that the party legally liable should be present; the assignees might say, that the solicitor had already been paid, the answer to which would be, pay the money into court, and serve the petitioning creditor, at the risk of costs. But in practice it never is found that the petitioning creditor pays his solicitor: no respectable professional man ever asks it. It might be an answer if the assignees said "he is not respectable;" but that is not pretended. The order should be made as prayed.

The CHIEF JUDGE : — In *ex parte Clarke v. Coggan* (c) a similar order was made.

Order made for payment of the bill of costs. No costs of this petition.

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(a) *Burwood v. Felton*, 5 Barn. & Cres. 43.

(b) *Ex parte Haynes*, 2 Gl. & J. 35.

(c) *Ex parte Clarke and Coggan*, 1 Cooke, B. L. 16 edit. 7.



C. of R.  
March 14,  
1836.

When a bill is exhibited at the time of proving, and afterwards is *bonâ fide* lost, the commissioner should give special directions dispensing with its production, on application for a dividend.

*Ex parte* WALLAS. — In the matter of HAMBLY.

THE petitioner in 1803 proved a debt of 365*l*. for money paid by him to the use of the bankrupt, and at the time of proving he exhibited a bill of exchange drawn by the bankrupt, and accepted by one *Bird*, which being over due at the time of the proof, and not being negotiable, was afterwards mislaid or lost. In 1808 the petitioner went to Madeira, where he had since remained. In 1834 his brother, who had a letter of attorney to act for him, learned that a dividend was payable, and wrote to him for the bill, to produce to the official assignee, when he answered he had no recollection of where the bill was to be found. The official assignee refused to pay the dividend, in accordance to a general order of the Lords Commissioners of the Great Seal, made in October 1835, that “when a creditor, or other person duly authorized under his hand to receive his dividend, shall apply for payment, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof,” &c.; “provided that no dividend shall be paid to any creditor holding any security for his debt until such security shall be produced, without special directions of a commissioner in that behalf.” Mr. Commissioner *Evans* being requested to give “special directions” to the official assignee to pay the dividend to the petitioner without the production of the security, the petitioner offering to indemnify the estate, refused to give any such directions. This was a petition praying that the official assignee might be ordered to pay the dividend to the petitioner without production of the security.

Mr. *Wilcox* for the petition.



Mr. *Keene* and Mr. *Deacon* for the respondent, the assignees.

1836.

*Ex parte*  
WALLAS.

In the matter  
of  
HAMBLY.

The CHIEF JUDGE:—It is a pity the commissioner did not think fit to give special directions according to the general orders, it being perfectly clear that this is a *bond fide* case; and the only consequence of the miscarriage of the commissioner is, the costs and expence of this petition.

The other Judges concurred in the order.

Application was then made that the costs of the assignees should be paid by the petitioner; but the Court refused to make that order, and directed the assignees to retain their costs out of the estate.

Dividend ordered to be paid without production of the security. (a)

(a) Since this case was decided, the following order has been made:—

LORD CHANCELLOR.

14th day of May 1836.

In the matter of bankruptcy.

WHEREAS it was ordered on the 31st day of October 1835, by the Lords Commissioners for the custody of the Great Seal, that no dividend should be paid to any creditor holding any security for his debt until such security shall be produced, without the special directions of a commissioner in that behalf: And

whereas the mode of proceeding in such cases has been attended with doubt and difficulty, I do order, that from henceforth, upon the statement by a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings; and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the commissioner



C. of R.  
April 23,  
1836.

A running account between a solicitor and another person is within the exception of the statute of limitations, and the debt on the balance is proveable.

*Ex parte* JOHN SEABER.—In the matter of JAMES SEABER.

THIS was an application to prove a debt on the balance of accounts, rejected by the commissioners as having been barred by the statute of limitations.

The petition stated, that on the 18th of August 1835 a fiat issued against *George Seaber*; that for many years previously to the bankruptcy, *James Seaber* had been in the habit of receiving various sums for the use of the petitioner, and of paying various sums on his account; and that for many years previous to the bankruptcy there was a mutual current and unsettled account. That the schedule annexed to the petition contained a true and correct statement of the account current, as the same stood at the date of the fiat. That at the date of the fiat the bankrupt was, and his estate was, still justly indebted to the petitioner in 1,150*l.* 14*s.*, upon the balance of the account current.

The schedule annexed contained a debtor and creditor account between *James* and *John Seaber*. One side, *James* Dr. to *John*, commenced in 1820, and contained items in every year down to June 1835; the other side, *James* Cr. to *John*, commenced in 1820 also, and contained items in every year down to April 1835; and the balance thereby appearing due was 1,150*l.* *John* was the father of *James*, and *James* was a solicitor. The entries in the bankrupt's cash ledger terminated in 1828.

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is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by a commissioner; and upon such indemnity being given the official assignee shall pay the dividend to the creditor.

COTTENHAM, C.



Mr. *Maule*, with whom was Mr. *Wigram*, for the petition: —

1836.

This is a petition to prove a debt, rejected by the commissioners as being barred by the statute of limitations, but this case comes neither within the statute of James nor within Lord *Tenterden's* act.

*Ex parte*  
SEABER.  
In the matter  
of  
SEABER.

The 21 Jac. 1. c. 16. sect. 3. enacts, “that all actions of account and upon the case, (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants,) all actions of debt grounded upon any lending or contract without specialty, are to be commenced and sued within the time and limitation following, and not after, that is to say, the said actions of account within six years next after the cause of such actions or suits.”

Then the 9 Geo. 4. c. 14. sect. 1. enacts, “that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the 21 Jac. 1. c. 16., or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person



1836.

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*Ex parte*  
 SEABER.  
 In the matter  
 of  
 SEABER.

whatsoever; provided also, that in actions to be commenced against two or more joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by that act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

It is submitted, however, that there is no necessity for any written admission of the debt under 6 Geo. 4. c. 14., as the case comes within the exception in the statute of James.

Under the word "accounts" the action for assumpsit is included, though not mentioned by name in the act; for sometimes an action of assumpsit lies where an action for account would not. The exception is not confined to actions of account alone, but extends to the accounts themselves. The wording of the statute is, therefore, somewhat loose, and is to be interpreted with reference to its spirit; and the cases have accordingly decided, that it is not confined to merchants' accounts, but that all within the mischief are within the purview.

Mr. *Maule* was here stopped by the Court.

Mr. *Swanston* and Mr. *Campbell* for the assignees: —

The bankrupt's books terminate in 1828, after which the only entries are in the petitioner's own books; but that is not enough. The common cases of exception to the statute do not apply to the present case. [The



CHIEF JUDGE:—Are there not three questions; 1st, Whether the relation of the parties is within the exception of the statute of James, so as to entitle them to an account in equity; 2d, If not, whether there is any account by the bankrupt amounting to an acknowledgment of the debts; and, 3d, Whether in the mode of the receipts and payments there is any appropriation of monies, so as to refer the items of payment to the earlier items? This evidence might come from either party.] Can the question of appropriation affect the statute of limitations? No question can arise whether sums were or not applied in liquidation of a debt, when we dispute the very existence of the debt itself. [The CHIEF JUDGE:—Merchants' accounts are not within the act, though the latest items are more than six years old; nor are other accounts, if any item is stated within six years. *Catling v. Heathcote. (a)*] Formerly the opinions of the different judges on the question as to merchants were conflicting, as appears from *Forster v. Hodgson (b)*, where Lord *Eldon* said, "The doctrine upon the question, whether the same law that applies to open accounts applies to merchants' accounts, is not to be reconciled," &c. In a late case Lord *Brougham* decided, that the statute of limitations did not apply to merchants accounts. (c)

*Williams v. Griffiths (d)* decides, that to take a case out of the statute, as between common persons, there must be a part payment in cash, or what is equivalent to it. *Willis v. Newman (e)* decided, that a verbal ac-

1836.

Ex parte  
SEABER.

In the matter  
of  
SEABER.

(a) *Catling v. Skoulking*, 6 Term Rep. 189.

(d) *Williams v. Griffiths*, 2 Cr. Mee. & Ros. 45.

(b) *Forster v. Hodgson*, 19 Ves. 180.

(e) *Willis v. Newman*, 3 Yo. &

(c) *Robson v. Alexander*, 8 Bligh, Jer. 518.  
(new series) 374.



1836. knowledge is not sufficient, within 9 Geo. 4. c. 14., to take the case out of the statute of James.

*Ex parte*  
SEABER.  
In the matter  
of  
SEABER.

In the case before the Court, the commissioners proceeded on the decision in *Rothery v. Munnings* (a), that after six years had elapsed the addition of another and later item, not connected with the former items, did not take the old items out of the statute. In the present case the items are too far distant.

The COURT declared, that this being a running account, the objection of the statute of limitations did not apply.

The order was:—Declare the petitioner's claim, as set out in the petition, is not barred by the statute of limitations; and refer it to the commissioners to review their decision as to the proof. No order as to costs. (b)

(a) *Rothery v. Munnings*, 1 *Barn. & Adol.* 15.

(b) The following additional references may be useful.

The statute of James only applies to mutual accounts,—not to the case of tradesman and customer. *Coste v. Harris, Bull*, N.P. 150.

The act is not confined to merchants. *Cranch v. Kirkman, Peake*, 121.

*Quære*, Whether transactions between principal and agent are within the statute? *Jones v. Pengree*, 6 *Ves.* 580.

The act does not apply where there are mutual unsettled accounts. *Cranch v. Kirkman, Peake*, 121.

Merchants' accounts, after six years of total discontinuance, are within the statute. *Martin v. Heathcote*, 2 *Eden*, 169.



*Ex parte* BRADSTOCK.—In the matter of WILSON.

C. of R.  
April 25,  
1836.

MR. SWANSTON:—In this case the Court referred to Mr. Commissioner *Evans*, whether a contract was beneficial to the estate. The commissioner, however, refuses to interfere or certify. To avoid the awkwardness to which this might give rise, all parties have agreed that the reference should be to Mr. *Gregg*, one of the deputy registrars.

When a reference has been made to a London commissioner, who refuses to act therein, the reference may go to an officer of court.

*Per Curiam*:—The Court always feels reluctance in making these orders. What has occurred in this case proves the reasonableness of that reluctance; but as the order has been pronounced, let the reference go to Mr. *Gregg* as asked.

References as to whether contracts are beneficial to the estate are reluctantly made.

*Ex parte* HARVEY.—In the matter of BOX.

C. of R.  
April 26,  
1836.

THIS was a petition by some creditors who had proved, to annul the fiat for want of a trading, which was as a bill-broker.

What is not sufficient evidence of a trading by bill-broking.

The petition stated, that up to March 1835, *Box* was a proctor in partnership with his father, and in 1834 became embarrassed, and went to Boulogne. In March 1835, the father ceased to be a proctor, but the business of *Box* and Son was carried on as usual; and *Box*, up to the time of issuing the fiat, exercised the profession of a proctor, and when absent his business was managed by his clerks. On the 19th of November 1835 a fiat issued against *Box*, by the name and description of *John Box* of Bell's Yard, Doctors Commons, and

When affidavits alleged to be impertinent are not read, the Court refers it to the officer to disallow, in taxation, costs of all affidavits which in his opinion are impertinent.



1836.

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*Ex parte*  
HARVEY.In the matter  
of  
Box.

Charlotte Street, Portland Place, scrivener and bill-broker. The petition also stated, that the petitioners were creditors. *Box* had obtained the requisite number of signatures to his certificate when the petition was presented; but it had not been signed by petitioners or any of them, nor had it been allowed when the petition was presented, but it was subsequently allowed before the petition was heard.

The petition stated, that *Box* never was a bill-broker or scrivener, or otherwise a trader.

Several affidavits were filed in opposition to the petition. One of them, by Mr. *Atherton*, was as follows: "That he knew and was acquainted with *John Box* for about two years previous to November last, during which period *John Box* carried on the trade or business of a bill-broker: that deponent was employed by *John Box* to assist him in his business, and was remunerated accordingly: that *John Box* carried on business principally at his private residence in Charlotte Street, Portland Place, and during the period aforesaid he was employed by many persons to get bills of exchange discounted, and did procure the same to be discounted for them, and amongst other persons deponent well remembers *John Box* being employed, and principally in the months of May, June, July, August, and September in 1834, to get bills of exchange discounted, and did procure the same to be discounted for *L——* of —, for *C——* of — esq., for *H——* of — gent., for *I——* of —, for *H——* of —, for — esq., an officer in the navy, and Mr. *R——* of —; and deponent remembers that, in August 1835, *Box* was employed by and did procure a bill of exchange to be discounted for Mr. *M——* of —: that *Box* did charge and was paid by his employers commission for his trouble in getting bills of exchange discounted for them; and *Box* carried on the



business of a bill-broker to a considerable extent during the two years previous to November last, and endeavoured to obtain a livelihood thereby, in addition to his professional business of a proctor which he carried on in Doctors Commons."

1836.

*Ex parte*  
HARVEY.

In the matter  
of  
Box.

A very similar affidavit was made by Mr. *Bathe*, accountant (omitting the names mentioned in the last). Mr. *Bathe* had known *Box* as a bill-broker for two years previous to February 1836, and recollected *Box* discounting bills, in June, July, and August 1834, for Mr. *D*— of —, into whose respectability deponent was sent to inquire, and for *H*— of —, and Mr. *J*— of —.

Mr. *Hay* also deposed, "that in 1832, 1833, and 1834, deponent had many dealings and transactions with *Box* in his trade or business of a bill-broker, which, to the knowledge of deponent, the bankrupt carried on to a considerable extent: that during the years aforesaid the bankrupt was in the habit of applying to deponent to assist him in getting bills of exchange discounted; and, knowing from the bankrupt that he was employed by others to get the said bills of exchange discounted, deponent charged to the bankrupt such commission only thereon as would enable the bankrupt to make an addition thereto, in order that he might obtain a profit for his trouble in the transactions from his employers: that he did not at the time know that *John Box* was a proctor, but believed that he sought and endeavoured to get his livelihood as a bill-broker."

A Mr. *H*— deposed, "that he had known *Box* intimately for many years, and was informed and believed he carried on the business of a stock-broker: that in May 1834 he employed *Box* as a bill-broker to get discounted for him a bill of 48*l.*, which he did, and charged deponent commission."



1836.

—  
*Ex parte*  
 HARVEY.  
 In the matter  
 of  
 Box.

Mr. *L. P. Goldsmid*, the bill-broker, deposed, "that he knew and was well acquainted with *Box*, and knew him for about eighteen months previous to November 1835, and during all that time or the greater part thereof he carried on, to the knowledge of deponent, the business of a bill-broker, and sought to obtain his livelihood by getting bills of exchange discounted; but he also at the same time carried on, in copartnership with his father, the profession of a proctor: that during the period of eighteen months deponent upon several occasions employed *John Box* to get bills of exchange discounted, and he has procured the same to be discounted for him deponent, and *John Box* has upon such occasions charged to deponent, and deponent has paid to him, commission for his trouble in getting the said bills of exchange discounted."

There was also an affidavit by a wine merchant, that he had employed *Box* as a bill-broker, and that he carried on business and sought to gain his living as a bill-broker.

Mr. *Swanston* and Mr. *T. C. Barber* for the petition.

Mr. *Messiter*, for the bankrupt, objected, that the fiat could not be annulled on the application of a creditor, except for fraud (*a*), as the bankrupt had obtained his certificate.

*Per Curiam*:—The petition was presented before the certificate was allowed, consequently the bankrupt took

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(*a*) *Ex parte Crowder*, 2 *Rose*, *Poole*, *Cox*, 227; *ex parte Moule*, 327. If there is fraud, the fiat 14 *Ves.* 602. See, however, *ex parte Levi*, *Buck*, 75. any length of time. *Ex parte*



his certificate subject to this petition. After certificate allowed, a fiat cannot be annulled for want of the requisites alone.

1836.

*Ex parte*  
HARVEY.

In the matter  
of  
Box.

Mr. *Twiss* and Mr. *Rogers* for the petitioning creditor.

The CHIEF JUDGE:— This is a friendly fiat, and therefore *prima facie* a case of suspicion; but that is not alone sufficient to annul. It does not appear to me that the evidence of trading is sufficient. It is in evidence that bills were discounted, but it is not sufficiently proved that *Box* discounted as a bill-broker within the 6 Geo. 4. c. 16.; but, on the other hand, the affidavit of *Goldsmid* makes out such a case that I should not annul without further examination into the fact; but my colleagues are of another opinion.

When the certificate has been allowed after a petition presented to annul the fiat, it is no bar to the petition.

Sir *John Cross*:— If any property were at stake, I might hesitate, but there appears to be none. I do not think this a case which demands further inquiry. An affidavit by the bankrupt was read with consent of the petitioner, otherwise I am not prepared to say that it was evidence. There is no evidence that *Box* ever held himself out to the world as a bill-broker; his ostensible business was that of a proctor. He may frequently have obtained cash for bills for friends, owing to his connections with small traders, &c. The statements of the witnesses in support of the bill-broking are too general, and *dolus versatur in generalibus*. Only one instance of discounting, amounting to 48*l.*, is mentioned; in that instance commission was taken; but it does not appear that the owner of this bill knew by whom it was actually discounted, or to whom the commission was actually paid; that instance, therefore, is not sufficient evidence. I am of opinion, on the whole, that the bill-broking was



1836.

an afterthought. In the fiat *Box* is called a scrivener, which it is admitted he was not.

—  
*Ex parte*  
HARVEY.

In the matter  
of  
*Box*.

*Sir George Rose* : — I should be anxious to sustain this fiat if possible, as *Box* appears to be acting fairly. But this fiat must be annulled on general grounds ; if it stands, no one touching bills of exchange, in any way of dealing with them, will be secure from being made a bankrupt. There does not appear to have been any intent to gain a “livelihood” by bill-broking. If *Box*, after hearing the opinion of the Court, still wishes for an inquiry into the fact of bill-broking, I think he may have it ; but probably he will find great difficulty in establishing it. Has he any books such as bill-brokers keep ?

*Per Curiam* : — The fiat is annulled, unless an application is made for an issue or a *viva voce* examination ; but the petitioner must be protected from the costs of this inquiry.

*Mr. Twiss* stated that some of the affidavits were impertinent. In *ex parte Williamson* (a) it was decided that the Court would decide the question of impertinence after hearing the objectionable affidavits : here they have not been read.

*Per Curiam* : — As the affidavits have not been read, the rule laid down in *ex parte Williamson* (a) does not apply. In taxing the costs, let the officer disallow the costs of all or any part of the affidavits which in his opinion are irrelevant.

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(a) *Ex parte Williamson*, 1 *Dea. & Ch.* 529. See also *ex parte Arnsley*, 2 *Dea. & Ch.* 119.



*Ex parte* ABBOTT.—In the matter of BARBER.

C. of R.  
March 11,  
April 29,  
1836.

THE bankrupt being in partnership with his brother, they in 1820 compounded with their creditors, paying 13s. 6d. in the pound, and subsequently compounded again. In 1825 the brother died; and in 1826 a commission issued against the bankrupt, under which *Weston* and *Williams* were chosen assignees, and a dividend of 2s. 6d. in the pound was paid on debts to the amount of 10,000*l.*; and the bankrupt obtained his certificate. The bankrupt then entered into a partnership with *Pope* and Co., which was dissolved in 1828, all the partnership debts being paid. He then carried on business alone, and in 1832 compounded with his creditors for 7s. 6d. in the pound, and received a release. After this he took a public house in Hungerford Market, where he continued till January 1835, when a fiat issued against him, under which *Browning* was chosen assignee, and *Abbott* was official assignee; and debts amounting to 1,800*l.* were proved (including a debt of *Williams*, the assignee under the commission of 1826), and about 600*l.* had been realized. When the fiat issued, the bankrupt owed *Pope* and Co., his former partners, some money, and they issued execution; and a question arose on this petition touching the sheriffs, which is not material to report.

After a composition not paying 15s. in the pound, a commission issued in 1826: the bankrupt was then allowed to trade and contract new debts: in 1835 a fiat issued against him: Held, the commission of 1826 could not be impounded to enable the property to be divided under the fiat.

That could only be done in case of fraud or contract to allow the bankrupt to trade.

Up to June 1836 the assignees under the fiat were ignorant of the previous commission, compositions, &c.; but on discovering the facts they served *Williams* (the surviving assignee under the commission of 1826) with notice of their intent to apply to the commissioner to divide the 600*l.* among the creditors under the fiat. *Williams* appeared before the commissioner, and declined to consent, unless under the order of the Court



1836.

—  
*Ex parte*  
 ABBOTT.  
 In the matter  
 of  
 BARBER.

of Review, whereon the commissioner declined to declare any dividend under the fiat.

This was a petition by the assignees under the fiat, stating the above facts, and alleging that *Weston* and *Williams*, the assignees under the commission, and also the greater portion of the old creditors, were fully aware of the dealings and transactions of the bankrupt since the commission, and had not interfered, and that some of such creditors had had dealings with him. The petition prayed that the commission of 1825 might be impounded, and the 600*l.* ordered to be divided among the creditors under the fiat.

March 11.

Mr. *Swanston* and Mr. *Lovat* for the petition : — By the 6 Geo. 4. c. 16. s. 127. it is enacted, that where a commission issues against a bankrupt who has compounded with his creditors, unless 15*s.* in the pound is paid, all his future effects shall vest in the assignees, notwithstanding his certificate. Now the bankrupt in this case compounded with his creditors, and did not pay 15*s.* in the pound under the commission of 1825 ; it therefore follows, from the terms of the clause, that all his future property would vest in the assignees under that commission, and deprive the creditors under the fiat of their rights. But the assignees under the commission having stood by, and allowed the bankrupt to acquire property, gives the creditors under the fiat an equity against them, which enables this Court to impound their fiat. In *ex parte Bourne (a)*, Lord *Eldon*, speaking of the instances in which a commission shall not be allowed to stand, though the legal right of the creditor, says, “take the instance of a commission taken out in 1820, and another taken out against the

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(a) *Ex parte Bourne*, 2 Gl. & J. 137 ; see p. 141.



same person four or five years afterwards upon a subsequent trading; according to the strict law, the creditors taking out the commission of 1820 would have a right to all the subsequently acquired property, until he should have obtained his certificate under the first commission (*a*); but if he has been permitted to go into the world as a trader, and gain credit as such, whatever a court of law might say about the rights of the creditors under the first commission, this Court has said it would support the commission to this extent, — that it would not permit the creditors under the first commission to take that which they could not take without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt as if he had his certificate, and that they should only take that part of the bankrupt's subsequently acquired property which should remain after all the creditors who had been so permitted to deal with him after the first commission should have been paid; that the profits derived from such subsequent dealings shall belong to the creditors under the first commission; but the debts contracted in his trading, after he secondly engaged in trade, with permission of those creditors, shall be first paid." (*b*) The legal title is in the assignees under the commission of 1825; the equitable right in the assignees under the fiat. In *ex parte Devas* (*c*) the Court were asked to annul a second commission, which, if the circumstances

1836.

*Ex parte*  
ABBOTT.

In the matter  
of  
BARBER.

(*a*) 5 Geo. 2. c. 30. s. 26.; now 6 Geo. 4. c. 16. s. 64. *D'Oliviera*, 8 Ves. 84. But see, *contra*, *ex parte Martin*, 15 Ves.

(*b*) See *ex parte Proudfoot*, 116; *ex parte Rhodes*, 15 Ves. 1 Atk. 253; *Troughton v. Gitley*, 543; and *ex parte Lees*, 16 Ves. Amb. 630; *ex parte Broun*, 2 Ves. 473.

jun., 67, and 1 Rose, 433; *ex parte* (c) *Ex parte Devas*. 1 Mont. Bold, Cooke, B.L. 10; *Everett v.* & Ayr. 420.

*Backhouse*, 10 Ves. 89; *ex parte*



1836.

—  
*Ex parte*  
ABBOTT.

In the matter  
of  
BARBER.

had favoured the application, might have been done; as it was, the first commission was impounded. (a)

Mr. *Bethell, contra*: — The fiat ought not to be impounded: in 1826 some property was sold under the commission, and the assignees may hereafter be called upon to produce the commission and proceedings in evidence; but as to any other matter, the assignees under the commission submit to such order as this Court may please to make.

Sir *George Rose*: — We cannot annul the commission, as the bankrupt has obtained his certificate thereunder; and it will be useless to impound the commission, unless a state of circumstances exists which would justify this Court in interfering by injunction to restrain the assignees from giving secondary evidence of the commission.

*Curia advisare vult.*

April 29,  
1836.

This day the petition was in the paper, the Court having permitted it to be mentioned again.

Mr. *Swanston*: — The Court are bound to interpose on the application of the assignees under the fiat, because it would interfere adversely to them; *ex parte Bourne* (b); *ex parte Devas*. (c) The assignees under the fiat want the legal title to the property, and therefore claim the interposition of this Court in favour of

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(a) The order in *ex parte Devas*, 1 *Mont. & Ayr.* 420, dismissed the petition to annul; but the first commission was impounded in the office. (b) *Ex parte Bourne*, 2 *Gl. & J.* 137. (c) *Ex parte Devas*, 1 *Mont. & Ayr.* 420.



their equitable rights. A second fiat has more than once been decided in this Court to be perfectly valid; *ex parte Devas* (a); *ex parte Ellison* (b); consequently no objection exists on that ground. In cases like the present it is in the discretion of the Court to annul either the first or the second commission; *ex parte Devas* (a); *ex parte Lees* (c). In what a situation are the parties if the Court refuses to act! The commissioner will not order a dividend, and if the assignees attempt to proceed without an order an application might be made for an injunction to restrain them.

1836.

—  
*Ex parte*  
ABBOTT.  
In the matter  
of  
BARBER.

The CHIEF JUDGE:— My difficulty is, do the facts enable us to interfere?

Sir John Cross:— Does this case come within the 127th section of 6 Geo. 4.? It appears that the bankrupt and his late partner twice compounded, for 13s. and 10s. in the pound; but the petition does not set out any deed of composition, and it does not appear that there was any agreement as to composition, any collateral security, or any release; and every composition is not within the act; *Norton v. Shakespeare*. (d) Therefore my impression till now was, that as it is *nudum pactum* the old creditors may still sue the bankrupt. I think the composition not within the 127th clause, it not having the effect of a certificate to bar debts, a point which I wish to hear argued. Moreover, there is not sufficient evidence of the fact of the composition. As to the payment

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(a) *Ex parte Devas*, 1 Mont. and see *ex parte Brown*, 2 Ves. & Ayr. 420. jun. 67. S.C. 4 Bro. C.C. 210.

(b) Per Chief Judge, *ex parte Ellison*, 2 Mont. & Ayr. 368. (d) *Norton v. Shakespeare*, 15 East, 619. S.C. 1 Rose, 347.

(c) *Ex parte Lees*, 16 Ves. 473;



1836.

—  
*Ex parte*  
 ABBOTT.  
 In the matter  
 of  
 BARBER.

of 15s. in the pound, it does not appear, on the petition, that the estate did not “produce” 15s. in the pound. The evidence is, that 2s. 7d. was paid; but the act does not speak of payment; the words are, “unless his estate shall *produce*, after all charges, sufficient to pay every creditor under the commission 15s. in the pound.”

Mr. *Swanston* : — In a plea by the assignees to a suit in equity they admit that 2s. 7d. only was produced; and we entertain no doubt as to that fact.

Sir *George Rose* : — If I were acting as commissioner I should not hesitate to administer the property under the fiat. The legal title of the assignees under the first commission is not denied. It makes no difference whether the composition was by deed or by parol. Before the 6 Geo. 4. c. 16. s. 171. the property would not have belonged to the assignees, but the creditors might have brought actions. I cannot find that the petitioners have an equitable title. Occasionally the Court acts on the embarrassment created by two commissions (*a*); but does that exist here to such a degree as to call on us to annul the fiat or commission? The mere embarrassment would probably lead us to annul the first commission, which would upset the subsequent fraudulent preferences, &c. if any such existed. Then is there a title in the assignees under the fiat against those under the commission either by contract or by fraud? Merely allowing the bankrupt to trade, after he has obtained his certificate (unless there be fraud), is not enough. The whole, therefore, comes to this question, whether the assignees have created a case of fraud by allowing the bankrupt to trade so as to set up a title

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(*a*) See *ex parte Devas*, 1 Mont. & Agr. 420.



owing to that fraud. I cannot find that as a fact. As to the contract, *Troughton v. Gitley* (a) was indeed as strong a case as could be; but then that case is not recognized as law, and so Lord *Eldon* has declared. Without the consent of the first assignees I do not perceive how this Court can act.

1836.

—  
*Ex parte*  
ABBOTT.  
In the matter  
of  
BARBER.

Sir *John Cross* : —

*Troughton v. Gitley* (a) is said to be of doubtful authority, and it has been so treated by Lord *Eldon*, because there was an equity prior to that of the administrator; but it has never been doubted that the equity was in the second purchaser; a whole current of authorities recognizes that equity; and such was the law when the 6 Geo. 4. c. 16. passed. Before that act the certificate protected the person only from arrest, but did not prevent the creditors suing at law. *Fowler v. Coster* (b) decided that a certificate under a third commission did not protect the bankrupt from arrest; but the Court in that case went further than it was called upon to do, and decided a point not judicially before them, viz. that a third commission was void. In *ex parte Bourne* (c) Lord *Eldon* declared he could uphold the second commission to the extent at least of protecting the new creditors.

It is not reasonable that the assignees under a second fiat should permit the bankrupt to trade during any length of time and to any extent, and retain the power at any moment of seizing his stock, and retaining it as against new creditors. In this case such a proceeding would be particularly unjust. The first commission

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(a) *Troughton v. Gitley*, *Amb.* 630.

(b) *Fowler v. Coster*, 10 *Barn. & Cres.* 427.

(c) *Ex parte Bourne*, 2 *Gl. & J.* 137.



1836.

—  
*Ex parte*  
ABBOTT.  
In the matter  
of  
BARKER.

issued ten years ago, after which the bankrupt continued to trade, and took a partner. He then compounded with his creditors, dissolved the partnership, paid off the new creditors, and removed to Hungerford Market, where he took a public house, and obtained a large stock upon credit. Then a fiat issues, the assignees under which take his property and sell it, and advertise a dividend, and the assignees under the commission do not interfere; they make no claim. The commissioner, however, perceiving the claim of the first assignees, himself insisted on that right for them which they did not for themselves.

The CHIEF JUDGE : —

I concur with the other Judges in thinking that the commissioner would have been fully justified in distributing these effects under the fiat; it was, nevertheless, perfectly correct to give notice to the assignees under the commission, which gave them the opportunity of claiming if they thought fit; if they did not, the commissioner might have proceeded to make a dividend; if they claimed, he should have suspended the declaration of dividend for some time, to ascertain what steps they would take. But the first assignees never claimed; they probably admitted the moral right of the subsequent creditors, which they had allowed to arise by their own inattention. Perhaps what has fallen from the Court may remove any difficulty from the mind of the commissioner.

Under the circumstances of this case, it appears to me impossible to order the assignees under the fiat to distribute the property in question, as that would be declaring the second assignment (or what is now equivalent thereto, the second choice,) good against the first; for it is to be observed, that though we declare



a second fiat to be valid, we cannot declare a second assignment to be so. Nevertheless, if an equity in favour of the second creditors were clearly made out, this Court might order the assignees under the fiat to pay the new creditors, and then distribute the surplus among the creditors under the commission. So doing interferes with the legal title of the assignees under the commission; and is the equity here strong enough in favour of the creditors under the fiat to enable the Court so to interfere? The dictum in *ex parte Bourne* (a) is indeed very strong; but the observations of Lord Eldon in that case are only illustrations of the general right to interfere, and not a judgment of what he would do in the particular case then before him. What he then said, therefore, only amounts to dicta. There is no decided case of interference in favour of subsequent creditors, except where there was either a contract to abandon the property to such subsequent creditors, or fraud on the part of the assignees under the first commission, for the purpose of inducing parties to trade with and trust property to the bankrupt. This Court, therefore, will interfere in favour of subsequent creditors where any contract or fraud exists on the part of the first assignees; it also interferes by superseding the first commission where the acts of the assignees thereunder lead to that being done.

No case has been cited where what is now asked has been actually done: on a similar state of facts as the present, in *Troughton v. Gitley* (b), it was put on the ground of contract, the assignees having sold to the bankrupt, but even that decision was shaken in *ex parte*

1836.

*Ex parte*  
ABBOTT.  
In the matter  
of  
BARBER.

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(a) *Ex parte Bourne*, 2 Gl. & J. 137.

(b) *Troughton v. Gitley*, Amb. 630.



1836.

—  
*Ex parte*  
 ABBOTT.  
 In the matter  
 of  
 BARBER.

*Bourne* (a): *ex parte Rhodes* (b) and *ex parte Martin* (c) are against this application: in *ex parte Bold* (d) a petition to supersede a second commission against an uncertificated bankrupt was presented by the petitioning creditor under the first commission, fifteen years having since elapsed, during seven of which the bankrupt had been permitted to trade, and the petition was dismissed.

The whole question in this case is, whether there are sufficient facts to enable the Court to declare that the assignees under the commission had contracted to abandon the property to the bankrupt, or whether they have laid by fraudulently, as regards the subsequent creditors. Lord *Eldon* says, in *ex parte Bourne* (a), that the mere fact of allowing the bankrupt to trade is not sufficient, as the assignees cannot prevent that. Then the circumstances under which the bankrupt was permitted to trade, in the present case, furnish no inference, as it appears the trade was unproductive, because on the dissolution the bankrupt was indebted to *Poole*, and the assignees could not seize, the property being subject to the partnership debts; the assignees could only seize the bankrupt's share remaining after paying the partnership debts. The trade which the bankrupt carried on alone after the dissolution of the partnership appears to have been unproductive, as he compounded with his creditors; the assignees could hardly then interfere while he was struggling with difficulties; and lastly, the public-house was a losing concern, and a fiat issued against him. The non-intervention of the assignees

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(a) *Ex parte Bourne*, 2 Gl. & J. 137. (c) *Ex parte Martin*, 15 Ves. 114.  
 (b) *Ex parte Rhodes*, 11 Ves. 559. Edit. 7. (d) *Ex parte Bold*, Cooke, 491,



under the commission was from motives of kindness, and not from fraud ; they are still unwilling to interfere, unless the law compels them. We cannot therefore interfere as to distribution, because there is no contract or fraud, nor can we supersede, the bankrupt being certificated. If, however, no claim is made by the first assignees, I do not perceive that the commissioner is bound to attend to a claim which the parties themselves abandon.

Sir *George Rose* suggested the order :—

Let the petition stand over, with liberty to the assignees under the commission to present such petition as they may be advised ; if they present no petition, let them take their costs of this petition out of the estates got in under the fiat, and then let the commissioner under the fiat be at liberty to distribute the property in question under the fiat.

1836.

*Ex parte*  
ABBOTT.

In the matter  
of  
BARBER.

*Ex parte* LATEY. — In the matter of DAVIS.

C. of R.  
1836.

April 25,  
30.

THIS was the petition of the Reverend *T. Latey* and *Susannah* his wife (late *S. Davis* Spinster), *Francis Davis*, and *Richard Hart Davis* Esquire, praying a declaration that they had a lien under the following circumstances.

*Thomas Davis*, by his will, in 1812, devised to his brothers, *Henry Davis* (the bankrupt) and the petitioner *R. H. Davis*, all his freeholds and leaseholds, monies, &c., “upon trust (subject to the proviso herein contained), as soon as conveniently may be after my decease, either

Where real property is devised to trustees on trust for sale, and to pay the produce to the children of the testator, and the children sell the property to one of the executors in consideration of a sum secured by bills

payable by instalments, and as to some shares further secured by an assignment of a policy of insurance, and the executor becomes bankrupt, without having paid the bills. Held, the children all had a lien on the estates for the sums unpaid.



1836.

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*Ex parte*  
LATEY.  
In the matter  
of  
DAVIS.

by public auction or private contract, to sell and dispose of all my real estates, and all such parts of my personal estate as shall not consist of money and outstanding debts, for the most money and best price or prices that can or may be obtained for the same, and to collect in and receive all my monies and debts. And I hereby direct, that before any such sale or sales as aforesaid of any of my freehold and leasehold estates shall take place, they, my said trustees or the survivors of them, his heirs, executors, or administrators, shall offer to sell my freehold and leasehold estates to my heir at law, for such prices and for such sums as I paid for the purchase thereof, and as are mentioned in the several deeds of conveyance and assignment thereof respectively ; and that my heir at law shall be at full liberty to purchase the same freehold and leasehold estates, or such part or parts thereof as he may think proper, at such price or prices as last aforesaid ; and that only such of my freehold and leasehold estates as my heir at law shall refuse or decline to purchase at such price or prices as last aforesaid shall be sold and disposed of in manner first herein-before mentioned."

And as to the monies to arise by sale and otherwise of his real and personal estates, the testator (after certain legacies) gave all the residue equally between *Richard Hart Davis, James Crosby Davis, Susannah Latey Davis, Francis Davis, and Henry Davis*. And the testator appointed *Henry Davis* and *Richard Davis*, one of the petitioners, executors of his will, and died in 1813, and *Henry Davis*, as acting executor, took possession of the testator's property.

By indentures of lease and release, dated the 28th and 29th of July 1815, between *Henry Davis* and *Richard Hart Davis* of the first part ; *Susannah Latey, Marianne Davis, Francis Davis, and James Crosby Davis* of the second



part, *Henry Davis* of the third part, and *W. Vincumbe* (a trustee to bar dower) of the fourth part, after reciting that an agreement and arrangement had been entered into by and between the said *H. Davis* and *R. H. Davis*, *S. Latey*, *M. Davis*, *F. Davis*, and *J. C. Davis*, that the whole of the said testator's freehold and leasehold estates should be taken to by the said *Henry Davis*, and should be conveyed or assigned to or in trust for him in manner therein-after mentioned; and that in lieu and in full satisfaction of the shares, rights, and interests of the said brothers and sisters therein and thereto the said *Henry Davis* should pay to each of them the sum of 868*l.* 10*s.* (making together the sum of 4,342*l.* 10*s.*), and that he the said *H. Davis* should enter into the covenant therein-after contained for payment of the debts remaining due from the testator *Thomas Davis*, as therein mentioned; it was witnessed, that in pursuance and performance of the said agreement, and in consideration of the sum of 868*l.* 10*s.* to each of the parties of the second part then paid by the said *H. Davis* (the receipt whereof was thereby acknowledged), and for a nominal consideration to each of them paid, and also in consideration of the covenant of the said *H. Davis*, therein-after contained, the parties of the second part granted, bargained, sold, aliened, ratified, and confirmed to *H. Davis*, to uses to bar dower, all the real property of the testator. *Thomas Davis*, *R. H. Davis*, and *J. C. Davis* were paid; but only a small part of the shares of *S. Latey*, *M. Davis*, and *F. Davis* was in fact paid at the time this indenture was executed, and to secure the remainder *H. Davis* gave each of them two promissory notes, dated 11th August 1815.

I promise to pay to the sum of  
500*l.* (value received) by instalments, at the times

1836.

Ex parte  
LATEY.

In the matter  
of  
DAVIS.



1836.      herein-after mentioned, viz., the sum of      £, part  
 ————— thereof, after the decease of *W. W.*, with interest from  
*Ex parte*      his decease; the like sum of      £. after the decease of  
*LATEY.*      *Elizabeth*, the wife of the said *W. W.*, with interest from  
 In the matter      the time of her decease; and the remaining sum of  
                          of  
                          *DAVIS.*      £. after the decease of *J. J.*, with interest from  
                          the time of his decease.

After six months' notice, I promise to pay to  
                          318£ (value received), with lawful  
 interest for the same, from the 13th of November last.

All these parties were dead when the petition was presented. None of the promissory notes were ever paid. *H. Davis* also assigned to *M. Davis* and to *H. Davis* a policy of insurance as further security. In December 1815 *S. Latey* (then *S. Davis*) married, and by her settlement, to which *H. Davis* was a party, the money due to her, and the note for the same, and the policy, were assigned to *Henry Davis* and *R. H. Davis* on the trusts of the settlement. In October 1833 a fiat issued against *Henry Davis*, and his assignees took possession of the property in question. The petition prayed that the Court would declare the petitioners had a lien for the amount of the sums due to them on the estates of *Thomas Davis* (the testator), so conveyed to *Henry Davis*, and that the assignees might be directed to pay to the petitioners what was due to them out of the estates of the bankrupt, or that the petitioners might prove.

Mr. *Chandless*, with whom was Mr. *Bethell*, for the petitioner:—This is a petition of a vendor to enforce his lien against the bankrupt's estate for the unpaid purchase money, a lien allowed both by natural justice and by principles of jurisprudence. The judgment



of Lord *Eldon* in *Mackreth v. Simmons* (a) is throughout in favour of the petitioner.

1836.

*Ex parte*  
LATEY.

In the matter  
of  
DAVIS.

Mr. *Chandless*, being about to cite other cases, was here stopped by the Court.

Mr. *Swanston* and Mr. *J. Russell* *contra* :—

The doctrine of the civil law is followed by us, and is the foundation of the decision in *Mackreth v. Simmons* (a), and any deviation therefrom would lead to inextricable confusion. The doctrine of lien is founded entirely on the decided cases: it has never hitherto been carried the length which is asked this day, and it has over and over again been declared that it is not to be carried further. Lien can only exist when the estate was originally the property of the party claiming the lien; but the petitioners never possessed any estate in the land. They were entitled to certain land under a will; they however agreed to take something instead of land. In this transaction no title passed; the estate was already vested in the bankrupt; there was therefore no purchase; and, of course, can be no vendor,—no lien. Wheresoever the legal estate in the land might be, the petitioners did not and could not convey it; and therefore there was no sale and conveyance. The testator created a charge on the estate, and the intent of the deed of 1815 was to exonerate that estate; yet it is contended that the charge still exists; if so, the deed was a nullity. A bond or note does not alone destroy the vendor's lien, but it may be so worded as to have that effect; for instance, no case can be cited where this lien was upheld, if the note were payable by instalments.

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(a) *Mackreth v. Simmons*, 15 *Ves.* 329.



1836.

—  
*Ex parte*  
 LATEY.  
 In the matter  
 of  
 DAVIS.

The reason a mere bond or promissory note does not discharge the lien is, that they are only personal securities; but if another primary fund is distinctly substituted and appropriated in payment the lien is gone, because such substitution is evidence of an intent to rely thereon.

2. The agreement made at the time was varied by the subsequent dealings between the parties. The contract in the deed was for immediate payment, which contract was varied by the agreement after *Webb's* death as to interest; and taking new security destroys the lien; *Nairne v. Prowse*. (a) In this case the ladies take a pledge of a policy of 1,000*l.* each; and in *Nairne v. Prowse* the security was stock: therefore, as to their two shares at least, if there ever were a lien, it is gone. Their not giving notice to the insurance office makes no difference; notice only is material in bankruptcy; and if they had no lien before bankruptcy they could not gain one afterwards. Where covenant is the consideration, the parties rest upon it, and have no lien on the estate, *Clarke v. Ryde*. (b)

3. This is a mere family arrangement, to which the doctrine of lien has never yet been applied. All the cases declare lien to be a question of intent: what then was the intent here? From 1815 down to the bankruptcy no claim of lien is set up, during which time the bankrupt mortgaged and even sold the estate; if a lien existed, why was it not claimed? If the parties were owners, they were so of undivided moieties; and can they have a lien upon an undivided moiety of an estate? Undivided shares cannot be sold, and no lien can exist without a sale. [Sir George Rose:—But how can the

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(a) *Nairne v. Prowse*, 6 *Ves.* 752.

(b) *Clarke v. Ryde*, 3 *Sim.*



assignees claim the estate discharged of the trusts?] The deed destroys the trusts; if not, if any trust exists, let the petitioners repudiate the deed, and go to equity to set it aside. [Sir *John Cross* :—The agreement was with one of two trustees only].

1836.

*Ex parte*  
LATEY.

In the matter  
of  
DAVIS.

Mr. *Chandless* in reply was stopped by the Court.

The CHIEF JUDGE:—

I am at present of opinion that the agreement of 1819 was an ascertainment of the amount, on payment of which the *cestuis que trusts* were willing to give releases; and if not paid the release would not enure, so that the trusts would still exist. The estates were devised to the bankrupt and another, on trust to sell them, and divide the produce, both of which things it was the duty of the trustees to perform. Instead, however, of selling, the parties came to an agreement that the bankrupt should take the whole of the estates, and pay a sum of money to his brothers and sisters, and that on payment they should release all right to the estate. If the bankrupt had accordingly paid, the agreement would have been a full release; but some part remained unpaid,—it is said by consent,—and for which notes were given, but they were not paid when due; thus the trusts still remained attached to the estate, and the bankrupt took as a purchaser with notice of the trusts. Giving the policies was not a release; it was only an inducement to the parties to postpone demanding payment.

Sir *John Cross* wished to take time to consider of his judgment.



1836.

—  
*Ex parte*  
 LATEY.  
 In the matter  
 of  
 DAVIS.

Sir *George Rose* :—It is the duty of this Court, as between the assignees and the estate, to take notice of any trusts, even though not on the face of a petition, and not urged by the parties themselves; but for this, on the case stated on the face of this petition, the Court would certainly find great difficulty in acting, though I am of opinion the lien would be found to exist. If the parties desire, let distinct accounts be taken, in order to let in the claim as against all persons interested in the estate, and also an inquiry, with liberty to any party to claim; and, subject thereto, declare the effect of the deed was, that the property was subject to the charge of £, which not being paid still exists as a lien in the estate; and costs of all parties out of the estate.

*Cur. ad. vult.*

April 30.

Sir *John Cross* stated that he concurred with the opinion already expressed by the other members of the Court.

*Per Curiam* :—The opinion of the Court is, that the events which subsequently occurred did not destroy the lien; and, moreover, the trust and the other circumstances of the case give the petitioner a right to what he asks.

C. of R.  
 May 6,  
 1836.

*Ex parte WILLIAMS*.—In the matter of BAKER.

The quorum  
 commissioners  
 named in a fiat  
 are entitled to  
 be summoned.  
 If not, the court  
 will interfere, and can declare every thing void done under the fiat in their absence.

THIS was the petition of one of the quorum commissioners in a country fiat, who had not been summoned to attend the meetings.

It stated that he is the senior of two quorum com-

missioners.



missioners in the first list of commissioners appointed under the 1 & 2 Will. 4. c. 56. s. 14. for the district including Birmingham, the four other commissioners being attornies, and that he resides within the borough of Birmingham: that on the 16th March last a fiat issued against *Baker*, and that *Thomas Hodgson* was the solicitor to the fiat: that the fiat was directed to the petitioner and another barrister, and four attornies: that *Baker* was adjudicated a bankrupt: that the petitioner was not summoned or applied to to attend at the opening of the fiat, nor at a subsequent public sitting: that the petitioner thereupon wrote to Mr. *Hodgson*, complaining that he had not been summoned; and that *Hodgson* stated in answer, that he had been informed at the office of *Lee*, one of the attornies named in the fiat, by one of his clerks (a person unknown to and unauthorized by the petitioner), that petitioner was from home, and that therefore *Hodgson* erroneously concluded that petitioner could not attend to open the fiat: that upon receiving such statement the petitioner assured *Hodgson* that he would have attended if he had been summoned, and referred him to the decision of the Court of Review in *ex parte Douglass* (a), and proposed that petitioner should receive his fees for the first meetings, and that *Hodgson* should engage to summon him to the future, which proposal was rejected by *Hodgson*; and that by a note received by petitioner from *Hodgson*, dated the 13th of April instant, *Hodgson* stated in effect that he was advised he ought to abide by the decision on any petition the petitioner might present in the matter: that if *Hodgson* had sent a summons to him there would have been no difficulty at

1836.

*Ex parte*  
WILLIAMS.  
In the matter  
of  
BAKER.

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(a) *Ex parte Douglass*, ante, page 218.



1836.

*Ex parte*  
WILLIAMS.  
In the matter  
of  
BAKER.

a few hours notice in fixing a time with the other commissioners for opening the fiat.

The petition prayed, that the proceedings had under the fiat might be declared void, and that the petitioner might be regularly summoned to attend the future meetings; that *Hodgson* might be ordered to pay all the fees which the petitioner would have received if he had been regularly summoned; and that *Hodgson* might be ordered to pay the costs of the petition.

The respondent filed affidavits stating that he was led to believe that the petitioner was absent elsewhere on business, and unable to attend; and since the petition was presented he had summoned the petitioner, and promised to summon him for the future.

Mr. *J. Russell* for the petition read the 23d section of 6 Geo. 4. c. 16. (a), and Lord *Loughborough's* order (b),

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(a) That at every meeting under any commission to be executed in the country, wherein any one or more of the commissioners named may be a barrister or barristers, such barrister or barristers, or as many of them as shall be willing to attend, not exceeding three at each meeting, shall be the acting commissioner or commissioners, and shall be entitled to his or their summonses and fees accordingly, in priority to any of the other commissioners in the said commission named. 6 Geo. 4. c. 16. s. 23., A. D. 1825.

(b) Order:—Whereas by the practice the solicitors, on suing out commissions of bankrupt to be executed in the country, have been at liberty to name their own commissioners to execute the same, two of whom are nominated esquires, and are considered to be barristers resident at or near the place where the said commission is to be executed, and also three solicitors or attorneys: And whereas it appears that in many instances improper persons have been named in such commission as the quorum commissioners, they not being barristers, which is contrary to my intent and meaning; I do therefore order, that in future the solicitors, in delivering to my secretary of bankrupts the names



and cited *ex parte Douglass* (a), and stated that this petition was presented to put a stop to a practice which was beginning to prevail in Birmingham; that it was presented with reluctance, and with the intention of protecting the creditors in general; and that the omission was the less excusable, as the following was printed in the margin of the fiat:—"N. B. By the terms of the fiat no meeting can be held unless one barrister attend; but the solicitor must observe, that by 6 Geo. 4. c. 16. s. 23. it is enacted, that all the barristers named in any commission, not exceeding three, as are willing to attend, shall be summoned. It is the duty of the commissioner therefore to summon all the barristers, not exceeding three, if willing to attend."

1836.

*Ex parte*  
WILLIAMS.

In the matter  
of  
BAKER.

Mr. Swanston *contra* :—

The assignees ought to have been served, because the prayer of this petition, if granted, would have a formidable effect on the estate of the bankrupt, viz. to render void all that has been done under the fiat.

Under the 1 & 2 Will. 4. c. 56. s. 14. (b) the

of the commissioners to be inserted in the commissions applied for by them, do insert in such list the names of two barristers resident at or near the place where such commission is to be executed, and that on no account they do insert the name of any gentleman to be nominated as a quorum commissioner unless he be a barrister.—Lord Loughborough's Order, A. D. 1800.

(a) *Ex parte Douglass*, ante, page 218.

(b) That the judges who go the several circuits in England

and Wales may be directed by the Lord Chancellor from time to time to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attornies practising in the counties to the said circuits belonging, and upon such persons being returned and approved by the Lord Chancellor the fiat or fiats aforesaid not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt according to the districts or



1836.

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*Ex parte*  
 WILLIAMS.  
 In the matter  
 of  
 BAKER.

Lord Chancellor has appointed for Birmingham two lists containing six commissioners in each, of whom two are barristers and four solicitors: the rights of the petitioner are founded on the fiat; but that is directed to *Williams* or *Bartlett* as quorum commissioners, and Mr. *Bartlett* has accordingly been regularly summoned. [The CHIEF JUDGE:—That is the usual form.] As to the memorandum in the margin of the fiat, it is an unauthorized addition.

The CHIEF JUDGE:—By Lord *Loughborough's* order the two barristers were to be of the quorum. The 6 Geo. 4. c. 16. s. 23. did not merely enforce this general order, but went further. The 1 & 2 Will. 4. c. 56. merely altered the method of nominating commissioners, viz. by the Lord Chancellor instead of the solicitor, as formerly was the case in country commissions. The moment the fiat issued the 23d section of 6 Geo. 4. c. 16. applied. The names of two barristers are inserted in this fiat, and both ought to have been summoned; the form of the fiat resembles that of the old commissions, under which more than one barrister must have been summoned. Mr. *Williams* is therefore entitled to the same order as was made in *ex parte Douglass* (a); and if, as in that case, there had been any wilful resistance, I should be of opinion that Mr. *Williams* should press for a similar order; but that not being the case, the question for Mr. *Williams* to determine is, whether he should not be

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places for which such persons	at any time to remove any person
shall be so returned, and to no	from the lists to be so returned
other person than such as shall	for such cause as to him shall
be included in such return: Pro-	seem fit. 1 & 2 Will. 4. c. 56. s. 14.
vided always, that it shall be	(a) <i>Ex parte Douglass, ante,</i>
lawful for the Lord Chancellor	page 220.



satisfied with being summoned for the future, he being paid the costs of this petition.

1836.

Sir *John Cross* and Sir *George Rose* concurred.

*Ex parte*  
WILLIAMS.  
In the matter  
of  
BAKER.

Mr. *J. Russell* consented to take the order as suggested.

*Per Curiam* : — The petitioner waiving his claim for fees, and the respondent undertaking to summon the petitioner for the future, it is ordered that the respondent pay to the petitioner the costs of this petition.

*Ex parte* WATTS.—In the matter of SCHLESINGER.

C. of R.  
May 3 & 9,  
1836.

A DOCKET was struck, and a fiat was sued out, but there was not any adjudication; another fiat was then taken out, and duly prosecuted. This was a petition by the petitioning creditor to tax the bill of costs of the solicitor, Mr. *Dimes*, to the fiat first sued out.

When there are three petitioning creditors one may petition to tax their solicitor's bill.

Mr. *O. Anderdon*, for the petition, stated the application could not be resisted, and cited *ex parte Cass*. (a)

The Court will order a solicitor's bill to be taxed though he has commenced an action, but the petitioner must pay the costs of the action.

Mr. *Jos. Parker*, *contra* : — There are two objections to this petition: first, there were three petitioning creditors who employed the solicitor, but this is the petition of one alone; secondly, the solicitor has commenced an action at law for the bill, and the Courts never interfere to tax after action commenced.

(a) *Ex parte Cass*, ante, page 170.



1836.

—  
*Ex parte*  
 WATTS.

In the matter  
 of  
 SCHLESINGER.

*Per Curiam* : — The usual order must be made. The act itself stays the action. After taxation, if you are not paid the taxed costs, the action may be proceeded with. The objection that only one applies would be a valid objection in equity, but it is not so in bankruptcy, where one alone constantly acts.

New order on  
 taxing bills.

The order was made as follows (a) : — “ The said petitioner by his counsel undertaking to pay the costs incurred in the action brought by the said *Thomas Dimes* against the said petitioner and his partners, in respect of the said bill of costs mentioned in the said petition, and further undertaking to give to the said *Thomas Dimes* the benefit of any sum to be received out of the estate of the said bankrupt in respect of his costs, so far as the said fiat had been worked by the said *Thomas Dimes*, and the said petitioner also undertaking to pay to the said *Thomas Dimes* what shall appear to be due to him upon the taxation of his said bill of costs, as between solicitor and client, it was ordered, that it be referred to *Francis Gregg* esquire, an officer of the court, to tax the said bill of costs in the said petition mentioned, as between solicitor and client ; and that the said *Thomas Dimes* and all proper parties be examined before the said *Francis Gregg* esquire, upon interrogatories or otherwise, touching the matters in question, as the said *Francis Gregg* should think fit, and produce before him upon oath all books, papers, and writings relating to the said bill, or to any of the items or charges therein, in his possession, custody, or power, as the said *Francis Gregg* should direct, and account

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(a) It is inserted at length, being a form lately adopted, which it will be perceived avoids the necessity of a second petition for costs after taxation.



for all sums of money (if any) received by him on account of the said bill; and that upon the petitioner paying to the said *Thomas Dimes* what should appear to be due to him upon such taxation, it was further ordered, that the said *Thomas Dimes* do deliver up to the petitioner, upon oath, all deeds, papers, and writings in his custody or power, relating to the said petition; and if upon taxation the said bill should be reduced by a less sum than one sixth part of the amount of the said bill, then it was ordered, that the said petitioner do pay to the said *Thomas Dimes* his costs of and occasioned by this application and of the said reference, and incidental thereto; but in the event of more than one sixth being taken off the said bill on such taxation, then it was further ordered, that the said *Thomas Dimes* do pay to the said petitioner, or to Mr. ———, his solicitor, the costs of the said petition occasioned by this application and of the reference, and incidental thereto; and that the said petitioner be at liberty to set off such last-mentioned costs against the amount of costs (if any) to be paid by the said petitioner to the said *Thomas Dimes*; and it is further ordered, that all proceedings at law in respect of the said bill be and the same are hereby in the meantime stayed."

1836.

Ex parte  
WATTS.  
In the matter  
of  
SCHLESINGER.

This day a motion was made to vary the minutes of the order. (a)

May 9.

Mr. *J. Parker* in support of the motion: — The first objection to the order is, that the costs are to be paid

(a) Mr. *O. Anderdon* objected, that what was asked could only be had on a re-hearing, to which the Court agreed; but the objection was waived, and the matter allowed to proceed as if a petition for re-hearing had been presented.



1836.

*Ex parte*  
WATTS.  
In the matter  
of  
SCHLESINGER.

as between solicitor and client; it should be as between party and party, as is the practice in other courts. A bill for business done under a fiat need not be delivered signed one month before commencing an action, not being, within the 2 Geo. 2. c. 23. s. 23., business done in "law or equity;" *Crowder v. Davies*. (a) If not business in law or equity, this Court has no jurisdiction to tax under the 2 Geo. 2. c. 23. s. 23. It was held in *Taylor v. M'Gaugan* (b), that a solicitor to a commission even — which this gentleman was not — may maintain an action for the amount of his bill up to the choice of assignees, without having his bill taxed by the commissioners under 6 Geo. 4. c. 16. s. 24., that clause only applying between the assignees and the estate. Then, in *Benton v. Bullard* (c), the Court of Common Pleas decided, that where an action is commenced for a bill, and then taxation ordered, and one sixth taxed off, the solicitor is not to pay the costs of taxation. The bulk of the items are not for charges in bankruptcy, so that the Common Law Court could have ordered taxation.

Mr. O. Anderdon, *contra*, stated, that whatever might be the practice of the Courts of Law, that in bankruptcy was to give costs, if one sixth was taxed off, whether an action had been commenced or not.

The CHIEF JUDGE: — It is of course to give costs as

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(a) *Crowder v. Davies*, 3 *Yo. & Pay.* 96. See also *Crowder v. Davies*, 3 *Yo. & Jer.* 433.

also in *Hamilton v. Jones*, 4 *M. & P.* 868; S. C. nom. *Hamilton v. Pitt*, 7 *Bing.* 232, and 1 *Dowl. P. C.* 209, and *Finchett v. How*, 2 *Camp.* 278. (c) *Benton v. Bullard*, 4 *Bing.* 561. It is the same in the King's Bench, *Jay v. Coaks*, 3 *M. & R.* 55, 8 *Barn. & Cres.* 635; *Harbin v. Miles*, 3 *Barn. & Cres.* 755.

(b) *Taylor v. M'Gaugan*, 4 *Carr.*



between solicitor and client. The 1 & 2 Will. 4. c. 56. s. 1. gives to this Court all the "rights, incidents, and privileges of a Court of Record, or Judge of a Court of Record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's Courts of Law or Judges at Westminster." The 2 Geo. 2. c. 23. gives the other Courts at Westminster power to tax solicitors' bills of costs, and therefore this Court has the power. As the petitioner did not come here till an action was commenced, he must pay the costs thereof. If this Court were deciding according to the legal effect of the words of the 2 Geo. 2. c. 23. s. 23., I am not prepared to say but that the decisions cited might bind this Court, although I am of opinion that the act does not give the discretion, in cases of action commenced, which the Judges of the King's Bench appear, according to the reported cases, to think it does. The words of the act are, "if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be less, the Court, in their discretion, shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bills." But this Court does not proceed altogether on the statute, but on practice, and the practice here appears to me to be founded on or to follow the statute. This Court cannot interfere with the practice of the King's Bench, neither must the practice of the King's Bench interfere here. The bill is so full of business done in bankruptcy that the solicitor might have had it taxed in this Court. The invariable practice in bankruptcy has been to give costs where one sixth is taxed off, whether an action has or has not been commenced.

1836.

—  
*Ex parte*  
WATTS.  
In the matter  
of  
SCHLESINGER.



1836.

—  
*Ex parte*  
 WATTS.  
 In the matter  
 of  
 SCHLESINGER.

Sir *John Cross* : — I am of the same opinion. If this is a question of law, the act is imperative, wherein I respectfully differ from the King's Bench; but it is a question of practice, and is *res judicata* in this Court.

Sir *George Rose* concurred.

Refused, with costs.

C. of R.  
 May 25,  
 1836.

An annuity payable while a person continues to superintend salt works, which may be discontinued by the brine not flowing, or by the lease of the brine pits becoming forfeited, is capable of valuation.

*Ex parte* PARRATT. — In the matter of BORRON.

**BROUGHTON** and *Sutton*, being lessees of certain brine pits and salt works at Anderton in Chester, for twenty-one years from 1828, entered into an agreement with *Borron*, dated January 1830, whereby *Borron* was to undertake the manufacture of salt for the benefit of *Broughton* and *Sutton*, "for the term or time, and upon, under, and subject to the several covenants, conditions, and agreements herein-after contained;" and by a subsequent covenant between the parties, "the contract hereby made shall subsist and continue for the term of twenty-one years (wanting three months) from July 1828." By the terms of this agreement, *Borron* was to manufacture certain stated quantities of salt annually; and one of the clauses was as follows: "that in case, at any time or times during the continuance of the said contract, there should be a failure of brine in the pits belonging to the said salt works, enduring for the space of ten days successively, the said *J. A. Borron*, during the continuance of such deficiency, be exonerated from his liability to manufacture salt under the said contract to an extent proportioned to the extent of the failure of brine."



When these articles were executed, *Broughton* and *Sutton*, together with one *Reid* and the petitioner, agreed to become partners in the manufacture and sale of salt, and the agreement with *Borron* was declared to be for the benefit of that partnership.

At the same time, *Borron* and the petitioner agreed to become partners together, as to the matters specified in the articles of agreement, and executed a partnership deed in January 1830. In June 1833 it was agreed between the petitioner and *Borron* that the petitioner should retire from the above partnership, and assign his interest to *Borron* in consideration of an annuity of 400*l.*, to be paid to him during the continuance of the agreement between *Broughton* and *Sutton* and *Borron*. A deed of dissolution was accordingly executed between *Borron* of the first part, *A. Borron* (the brother) of the second part, and the petitioner of the third part, whereby the partnership was dissolved between *Borron* and the petitioner, who, in consideration of an annuity of 400*l.* therein-after secured, sold to *Borron*, &c. "all the share and interest of the petitioner in the copartnership, and in the profits, and in the partnership effects." And *Borron* and his brother, for themselves, their executors and administrators, jointly covenanted that they or one of them would, during the continuance of the articles of agreement of January 1830, pay to the petitioner an annuity of 400*l.*, and that such annuity should be a charge on the sums payable to *Borron* for the manufacture of salt, under the articles of agreement of January 1830. The dissolution took place accordingly, and was advertised in the gazette.

The annuity of 400*l.* was paid till December 1833. In August 1834 a fiat issued against *Borron*. In September 1834 the petitioner and *Reid* retired from the partnership between *Broughton*, *Sutton*, the petitioner,

1836.

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*Ex parte*  
PARRATT.

In the matter  
of  
BORRON.



1836.

—  
*Ex parte*  
PARRATT.  
In the matter  
of  
BORRON.

and *Reid*. The annuity was valued at 4,483*l.* at the bankruptcy; and the petitioner applied to prove for that sum, but the proof was rejected, on the ground that the annuity depended on contingencies not capable of valuation.

The petition stated, that the assignees had sold all their interest under the articles of agreement of January 1830 for a sum of money, the amount of which petitioner did not know, and that he was entitled to have that sum applied towards payment of the value of his annuity.

The petition prayed, that the assignees might be ordered to account in respect of the sale of their interest under the articles of agreement of January 1830, and that the same might be applied in payment of the 4,483*l.*, the value of the annuity, or that the commissioners might be directed to ascertain the value of the annuity, and the petitioner admitted a creditor for such value.

Mr. S. Sharpe, for the petition, stated that the rejection of the proof was improper, and cited *ex parte Saxe (a)*, and insisted the petitioner had a right to the proceeds of the sale of *Borron's* interest, under the terms of the deed of dissolution.

Sir George Rose : — Was notice given of the dissolution and assignment of the petitioner's share? otherwise it might have been in the reputed ownership.

Mr. S. Sharpe : — The petitioner was a partner with *Broughton, Sutton, and Reid*, and he of course had notice, and notice to one partner is sufficient.

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(a) *Ex parte Saxe, Mont. & Bli. 134.*



Sir *George Rose* : — Notice to one partner is notice to all, if given touching a partnership transaction, or in the ordinary course of partnership transactions ; not otherwise. Was the assignment of *Borron* of that nature ?

1836.

—  
*Ex parte*  
PARRATT.

In the matter  
of  
BORRON.

The CHIEF JUDGE : — *Ex parte Watkins* (a) decides that mere knowledge is not enough, but regular notice must be given.

Mr. *Swanston* and Mr. *Bacon*, *contra* : — This annuity cannot be proved, as its continuance is subject to so many contingencies that its value cannot be ascertained ; it is to continue while the agreement of January 1830 is in force : but as *Broughton* and *Sutton* were themselves only lessees, their lease might be forfeited by many things to the ground landlord the Earl of *Mansfield*, which would put an end to the agreement of January 1830. [The CHIEF JUDGE : — I presume the lease to *Broughton* and *Sutton* would only be forfeited by acts of waste, or other wrongful acts.] That does not appear : it may be forfeited by other acts : the petitioners ought to satisfy the Court as to that by production of the lease itself. How can a value be put upon the contingencies of forfeiture or nonforfeiture of the lease, and of the continuance or stoppage of the flow of brine in the brine-pits ? But the petitioner has, by his own acts, put an end to the contract ; for it appears by the affidavits filed in answer, that early in January 1834 *Borron* told the petitioner the docket had been struck, whereon the petitioner in February gave orders to carry on the salt-making for his own benefit ; and *Lorron* ceased to receive any monies on account of

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(a) *Ex parte Watkins*, ante, page 348.



1836.

—  
*Ex parte*  
 PARRATT.  
 In the matter  
 of  
 BORRON.

manufacturing salt; and since then neither the bankrupt nor his assignees have interfered. Moreover, the interest of the bankrupt in the property was in his reputed ownership.

Mr. *S. Sharpe* in reply was stopped by the Court.

The CHIEF JUDGE:—The Court is of opinion that the petitioner is entitled to prove the value of his annuity; though there are some circumstances I wish to see cleared up before any specific sum is ordered to be paid on that part of the prayer of the petition. I am not satisfied that this annuity was incapable of valuation; the term of its continuance appears to me defined on the face of the contracts. By the deed of dissolution the annuity is to be paid during the continuation of the contract of January 1830, to which we must therefore refer, to ascertain its duration. On doing so, it appears that *Borron* covenanted, for himself, his executors and administrators, that he would make salt under the conditions, &c. “therein-after contained;” and we find that it is “therein-after” specified, that the agreement is to continue twenty-one years wanting three months. The intention of the parties then becomes clear, that twenty-one years should be the period of its continuance; and when the partnership was dissolved between *Borron* and the petitioner they contemplated that the petitioner should receive the annuity till the end of the twenty-one years, if the petitioner lived so long. Then as to the claim of lien on the monies received by the assignees from the sale of the bankrupt’s interest in the contract of January 1830, it has been stated they have made some bargain relative to the sale thereof by which they gain 1,700*l.*; and that part thereof was on account of this interest of the bankrupt. How the fact



is does not appear in evidence. As to that an inquiry may perhaps be allowed; but I do not perceive it would be likely to be attended with benefit to the petitioner. As it appears to me, the assignees could not have received any pecuniary advantage by sale of a contract for the personal superintendence of the bankrupt. Also an inquiry may be had, if wished, as to the question of notice, without which the property would be in the reputed ownership of the bankrupt.

1836.

—  
*Ex parte*  
PARRATT.  
In the matter  
of  
BORRON.

Mr. *S. Sharpe* : — After what has fallen from the Chief Judge the petitioner gives up all claim of lien.

Sir *John Cross* : — I concur with the Chief Judge.

Sir *George Rose* : — It would be difficult to contend that the doubts entertained by the commissioners were not fair, though their judgment was incorrect. Some check should be laid upon the dividend, in order that any equities belonging to the estate may be worked out. When time is the ingredient of the contract, that furnishes the limit of the valuation. In this case death would have terminated the contract, but that is provided for by the addition of “executors and administrators.” A deficiency of brine is the only circumstance provided to put an end to the contract. That the lease itself from the ground landlord might be forfeited is not a contingency the happening of which is of sufficient probability to prevent the valuation of this annuity. Proof for the value of the annuity must therefore be ordered, reference in valuation being had to the articles. The dividends must be reserved, if the assignees desire.

Mr. *Swanston* : — The assignees do not so desire.



1836.

*Ex parte*  
PARRATT.  
In the matter  
of  
BORRON.

*Per Curiam* : — Declare the petitioner entitled to prove for the value of the annuity, petitioner abandoning all claim of lien as against the assignees, without prejudice to any claim against other parties.

C. of R.  
April 26,  
May 31,  
1836.

A proof of debt cannot be rejected by a commissioner merely because there are no entries in the books of the party seeking to prove.  
*Semble.*

*Ex parte* BEASLEY. — In the matter of PARKER.

THIS was a petition of appeal from Mr. Commissioner *Evans*. The petition stated that the rejection of the proof was solely because there were no entries of the items in account books; the affidavits in answer, however, rendered it doubtful whether the rejection was for that reason, or because the commissioner declared a previous private meeting necessary, which was not held.

Mr. *Swanston* for the petition.

*Per Curiam* : — It is essential to ascertain whether the rejection was for want of the private meeting or because there was no entry in the books. It is quite clear that the mere fact of non-entry of items in books is not, standing by itself, and without further inquiry, sufficient to authorize any commissioner to reject a proof.

Let the petition stand over, and refer it to the commissioner to certify whether the debt was rejected by him; and if rejected, on what ground. If not rejected, let the petitioner be at liberty to prosecute his proof.

May 31.

The CHIEF JUDGE : — I understand that there is a memorandum on the proceedings of the rejection of



the proof, and that the commissioner intended to reject the proof. Under these circumstances, and as the commissioner has fully examined the evidence, the Court cannot refer the matter to any other person. The Court must now decide the question.

1836.

*Ex parte*  
BEASLEY.

In the matter  
of  
PARKER.

The petition to be put into the paper again.

*Ex parte* BIGNOLD. — In the matter of  
BRERETON.

C. of R.  
May 31,  
June 1,  
1836.

THE Norfolk and Norwich joint stock bank carried on business under the 7 Geo. 4. c. 4., and had branch banks at Foulsham and at Fakenham. The Foulsham branch bank was more than ten miles from Norwich, and managed by their agent Mr. Waller. Brereton (the bankrupt) was a banker, residing at Brinton, which is more than ten miles from Norwich, and is seven from Foulsham, and nine from Fakenham; and he had credit with the Norwich bank for such sums as he should want in the course of his business. Brereton received from the Norwich bank a book of printed checks, some dated "Norwich," others "Fakenham" and "Foulsham;" so that he might draw checks payable at either place. During each week, Brereton, when he wanted money, wrote a note to Mr. Waller, the agent at Foulsham, requesting to be furnished with money, which note he sent by a servant; and Thursday being market day, he usually wanted more money on that than on any other day. On the evening of each Thursday Brereton and Waller settled accounts, when it was ascertained how

A person having credit with a bank received money from the agent of the bank, and every week gave him an unstamped check on the bank for the amount advanced during the week, which the agent sent to the bank as a voucher for himself; this check was drawn more than ten miles from the bank, and post-dated: Held, not within sect. 13. of 55 Geo. 3. c. 184.

A person issued checks more than ten miles from the bank where payable: Held, to bring the bank within the penalties of checks knowing

sect. 13. of 55 Geo. 3. c. 184., it must be proved that the bankers paid the checks knowing they were issued more than ten miles off.

Striking balances does not prevent the operation of 55 Geo. 3. c. 184. s. 13.

An offer of composition by the acceptor of bills, not acceded to, with a declaration, in the presence of the drawer and holder, that he (acceptor) had not and should not provide for them, does not dispense with the necessity of presentment and notice of dishonour.



1836.

---

*Ex parte*  
 BIGNOLD.

 In the matter  
 of  
 BRERETON.

much had been advanced to *Brereton* during the preceding week; and *Brereton* then drew a check on the Norwich bank for the amount, dated the next day (Friday), and delivered it to *Waller*, who forwarded it on Friday to Norwich by way of voucher to account for so much money.

*Brereton* had also given checks to different persons in the ordinary way, in order that they might procure cash on them at the Norfolk and Norwich bank. The word "Norwich" was printed on these checks, but in fact most of them were issued at or near Brinton, or other places beyond the statutable distance from Norwich for checks; it did not appear that the bankers knew this, but a Mr. *Kendall*, a clerk, deposed that he had no doubt they knew.

*Brereton* deposited with the Norfolk and Norwich bank, as security for sums lent, various bills drawn by himself on and accepted by a third person (Mr. *Ehwall*). On the 27th of January one of these bills was presented for payment, and dishonoured. On the 28th a meeting took place between a person from the bank, *Brereton*, and *Ehwall* the acceptor, and *Ehwall* then stated that he had not and should not provide for payment of the bills in full, but offered terms for a composition, which were not accepted by the bank, and the parties separated. Next day (the 29th) another bill became due, was presented, and dishonoured. Several other bills fell due after this; but the bank, to prevent the injurious effect or discredit of having bills held by them dishonoured, did not present any more of these bills.

In March 1836 a fiat issued against *Brereton*. At the time of his bankruptcy he owed the bank 29,720*l.* on the balance of his current account, and for interest and commission, and 23,885*l.* for money lent to him on the credit of the bills of exchange of which he was the drawer. The Norfolk and Norwich company held a



mortgage from *Brereton*, which was subject to prior incumbrances, deducting which, its estimated value was 862*l*.

This was a petition by *Bignold*, stating himself to be one of the public officers of the company in whose names proceedings under any bankruptcy on behalf of the company were authorized to be taken, praying to prove for 52,744*l*., the whole amount claimed due from *Brereton*, deducting the 862*l*., the estimated amount of the security.

The proof had been rejected by the commissioners, on the grounds, 1st. That *Bignold* (the petitioner) was not the proper person to prove, as there had been changes in the partnership during the time the debt was incurred, therefore *Bignold* could not prove as partner, and he could not prove as an officer, as the requisites as to registry had not been complied with; 2d. That the sums advanced by the agent, *Waller*, and for which checks were given, could not be proved, as having been advanced on drafts issued more than ten miles from Norwich, and post-dated; 3d. That the sums paid by the bank on checks issued by the bankrupt to third persons could not be allowed the bank in account, as they were issued more than ten miles from Norwich; and, 4th. That no proof could be made on the bills of exchange, as they had not been presented for payment, nor any notice of dishonour given to the bankrupt.

The commissioners, however, adjourned the choice of assignees, to give the petitioner an opportunity of applying to the Court of Review.

Mr. *Swanston*, Sir *W. Follett*, and Mr. *O. Anderdon*, for the petitioner :—

As to whether *Bignold* is properly registered pursuant to 7 Geo. 4. c. 4. s. 46., the objection that he is

1836.

*Ex parte*  
BIGNOLD.

In the matter  
of  
BRERETON.



1836.

—  
*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 BBERETON.

not the registered officer is removed by the affidavit filed in support of the petition, stating such to be the fact. The question has already been before the Courts in *Armitage v. Hamer* (a), and *Edwards v. Buchanan*. (b) [Sir George Rose : — That point need not be argued at present.] The principal question is, whether the checks given to the agent fall within the penalties of the stamp act (55 Geo. 3. c. 184.), which, after imposing certain duties on bills of exchange, exempts therefrom all bankers drafts dated on or before the day when issued, within ten miles of the place where issued, and with such place specified thereon.(c) And the 13th section

(a) *Armitage v. Hamer*, 3 Barn. & Adol. 793.

(b) *Edwards v. Buchanan*, 3 Barn. & Adol. 783.

(c) *Exemptions from the preceding and all other stamp duties.*

—“ All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as bankers, who shall reside or transact the business of a banker within ten miles of the place where such draft or order shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.” 55 Geo. 3. c. 184. schedule. And a subsequent statute enacts as follows :— “ That from and after the passing of this act all

drafts or orders for the payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain, upon any banker or bankers, or any person or persons acting as bankers, who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued, shall be and the same are hereby exempted from any stamp duty imposed by any act or acts in force immediately before the passing of this act; any thing in any such act or acts to the contrary notwithstanding; provided the place where such draft or order shall be issued shall be specified therein; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payments to be made by bills or promissory notes.”—9 Geo. 4. c. 49. s. 15.



enacts, that to prevent evasions, any draft issued for payment of money to bearer, dated on a day subsequent to the day issued, or which shall not truly specify the place where issued, shall not fall within the exception: the clause proceeds to enact a forfeiture, and concludes by declaring that the party offending shall not be allowed money so paid in account against the person by whom such draft was drawn, or his assignees, in case of bankruptcy.(a)

1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BREKETON.

(a) "And for more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts, or orders for the payment of money, under colour of the exemption in favor of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed, it is enacted, that if any person or persons shall, after the 31st day of August 1815, make and issue, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall, for every such bill, draft, or order, forfeit the

sum of 100*l.*; and if any person or persons shall knowingly receive or take any such bill, draft, or order in payment of or as security for the sum therein mentioned, he, she, or they shall, for every such bill, draft, or order, forfeit the sum of 20*l.*; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft, or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it is issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or bankers or person or persons so offending shall for every such bill, draft, or order forfeit the sum of 100*l.*, and moreover shall not be allowed the money so paid or any part thereof in account against the person or persons by or for whom such bill, draft, or order



1836.

—  
*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 BRERETON.

The present case comes within the exception in favour of bankers drafts, and is not within the penalties of section 13. The draft was not given for payment of any sum to bearer, but as a voucher that certain sums had already been paid.

Some years ago a case occurred, of *Thompson*, a brewer, where a party, living at Hereford, drew a check as a voucher, and it was contended that all the monies advanced thereon by the bankers were to be excluded from the account, because paid on this voucher in the form of a check, but unsuccessfully. [Sir G. Rose:—Was any action commenced?] No action was pending. In *Swan v. the Bank of Scotland (a)*, a party sent a servant to the agent of the Dumfries Bank, with letters or orders for the payment of money, which was accordingly advanced, and the House of Lords held that such letters or orders were not drafts within the meaning of the stamp act. Now all the advances made to *Brereton* were quite independently of the checks, which were given to *Waller* as vouchers; and in an action by the Bank against *Brereton* the checks would not be necessary in evidence to prove the advances to him. The fact that the drafts were post-dated makes no difference, as they are in no way within the intent of the clause: the day of the date makes no difference.

As to the second class of transactions, viz. those in which the bankrupt gave drafts to third persons more than ten miles from Norwich, where the drafts were issued, there is no evidence to prove where the bankrupt was when he issued the checks.

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shall be drawn, or his, her, or	son or persons claiming under
their executors or administrators,	him, her, or them."—55 Geo. 3.
or his, her, or their assignees or	c. 184. s. 13.
creditors in case of bankruptcy	(a) <i>Swan v. Bank of Scotland</i> ,
or insolvency, or any other per-	<i>postea</i> .



In *Downes v. Richardson* (a) it was held that a note was not issued, so as to render a new stamp necessary on alteration, till in the hands of some one entitled to claim payment, even though accepted and indorsed. The respondents fail to prove that the bankers paid the checks "knowing" they were issued beyond the legal distance, which is essential. An argument in favour of the petitioner, applying to both classes of checks, is, that there is a settled account and balance struck annually on the 5th of April; a balance was also struck every week, when the pass book was sent to *Brereton* to examine: if the Bank brought an action against *Brereton*, this book would be evidence against him. The stamp act cannot unrip settled accounts of an unlimited extent. It is contended, therefore, that the act does not apply to a settled account. In *Owens v. Denton* (b) goods were sold by an illegal measure, the consequence of which was, the price could not be recovered by action; but there having been a settled account, in which the price formed an item, it was held, the balance of the account could be recovered. [Sir G. Rose:—In a late case in the Common Pleas it was held that a settled account did not preclude striking out items. — The CHIEF JUDGE:—Otherwise a weekly settlement of account would nullify the act. — Sir J. Cross:—Does a settled account ground a new promise? — Sir G. Rose:—Should not the petition stand over, with liberty to the assignees to proceed for the penalties under the act?] The assignees cannot act; only the officers of the Crown can proceed for the penalties. (c)

The only remaining question is as to the want of

1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BRERETON.

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(a) *Downes v. Richardson*, 5 *Barn. & Adol.* 674, S.C. 1 *Dow. & Ry.* 332. *Bay. on Bills*, 94. (c) "No person shall commence or prosecute, &c. any action, information, &c. in his Majesty's Courts, &c. against any person for the recovery of any fine or



1836.

—  
*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 BRERETON.

presentation and notice of dishonour of the bills of exchange. The first bill fell due Jan. 27; it was presented, dishonoured, and due notice thereof given. On the 28th a meeting took place, when a composition was offered by the acceptor; on the 29th another bill became due, and was presented and dishonoured; after which it was conceived more expedient for the credit of the firm that the remaining bills should not be presented, and it was the agreement of the parties that presentation, &c. need not be made. The case of *Brett v. Levett* (a) is sufficient to authorize the proof on the bills; it being there decided that want of notice to a bankrupt drawer of the dishonour of a bill might be supplied by evidence of his acknowledgment, after the act of bankruptcy, that it would not be paid. Besides which, these were accommodation bills, not requiring notice of dishonour to be given. (b)

The petitioners hold a security of the computed value of 862*l.*, for sale, &c., of which the usual petition of an equitable mortgagee is or will be presented; and the proceeds of that sale may be applied in part payment of any part of the debt at present claimed which the Court may be of opinion cannot be proved, according to *Philpotts v. Jones* (c), where it was held, if money be paid generally on account, and some of the items of the account are illegal, as for spirits, in contravention of 24 Geo. 2. c. 40. sect. 12., and other items are legal,

penalty incurred by virtue of this or any other stamp act, unless the same be commenced, prosecuted, &c. in the name of his Majesty's Attorney General in England, or his Majesty's Advocate in Scotland, or in the name of the solicitor or some other officer of the stamps; and the proceeding in the name of any

other person is declared null and void."—44 Geo. 3. c. 98. s. 10. But see *Smith v. Gillett*, 4 Nev. & Man. 225.

(a) *Brett v. Levett*, 13 East, 213, S.C. 2 Rose, 202.

(b) See notes (a) and (b), page 646.

(c) *Philpotts v. Jones*; 2 Adol. & Ellis, 41.



the creditor may apply the payments to the illegal items, and proceed by action to recover the legal items.

Mr. *Earle*, Mr. *Bethell*, and Mr. *Cobbett*, *contrà*, for the petitioning creditor :—

This is an appeal from the decision of the commissioners, which the petitioners must show good cause for reversing.

In April last, when *Bignold* tendered the proof, he had not been enrolled pursuant to 7 Geo. 4. c. 46. sect. 5., the bank being then at an end; and as there have been fluctuations in the partnership, *Bignold* can only prove as a partner for what was due while he was such. [*Per Curiam* :—The objection of form may easily be surmounted. The CHIEF JUDGE :—Did not *Brereton* acknowledge the continuation of the firms, by continued dealings with the new partners?] As to the checks, *Waller*, the agent, advanced monies to *Brereton* on the faith that he would draw a check; till that was done the transaction between them was confined to themselves: as between *Brereton* and the Bank, the advance is made on the faith of the check.

Mr. *Earle* was here about to read an examination of Mr. *Waller* taken before the commissioners.

Sir *W. Follett* objected, that the examination was not evidence against the petitioner, having been taken behind his back, and no notice to read it having been given.

*Per Curiam* :—If the petitioner were present, and might have cross-examined the party, it would be evidence against him, without notice to read it; or it might be read as evidence, though the petitioner were absent, if notice had been given to read it. (a) In this case the

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(a) See the rule fully laid down, *ex parte Crosbie*, ante, 397.

1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BRERETON.

On a petition to prove, examinations before commissioners, taken in the absence of the party to be affected, cannot be read as evidence, unless notice to read them has been given.



1836.

—  
*Ex parte*  
 BIGGOLD.  
 In the matter  
 of  
 BREBETON.

examination cannot be read, there being no notice to read it, and no evidence that the petitioner was present.

The argument then proceeded.

It has been contended these drafts were not “issued” within the meaning of the act; but to “issue” is not a technical word; it is of common parlance: proposals, prospectuses, cards of invitation to a party, are “issued,” but not to third parties. [Sir G. Rose:—The King’s Bench held that where the petitioning creditor retained the commission in his own hands, it was not “issued,” though delivered to him. (a)] If issuing a check be not the first parting with it, there may be difficulty in stating when the issue takes place; the illegal draft was contemplated when the money was advanced; it is true some time elapsed between advancing the money and drawing the check; but if that argument succeeds parties will reduce the time day by day, hour by hour, and moment by moment, till it may become a question whether the money or the check first passed over the counter. This would open a door to all the evils the statute contemplated.

In *Waters v. Brogden* (b) B. drew a check at his house, four miles from Llanelly, and dated it at Llanelly: it was drawn on a banker at Llanelly, and B. delivered it to his servant to give to C.; but the servant discounted it with a banker at Carmarthen, twelve miles from Llanelly, and five days afterwards the banker at Llanelly stopped payment, A. not having presented the check; and it was held the check could not be given in evidence for want of a stamp.

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(a) See *Wydown’s case*, 14 Ves. 87; *Watkins v. Maund*, 3 Camp. 309; *ex parte Freeman*, 1 Ves. & Bea. 39; and *Sowerby v. Brooks*, 4 Barn. & Adol. 523. (b) *Waters v. Brogden*, 1 Young & Jervis, 457. The reason of the decision was its being untruly dated at “Llanelly.”



The respondent is willing to try an issue on the question, whether the Bank “knew” that the drafts were issued more than ten miles from Norwich. But, as it appears from the evidence, that the Norfolk and Norwich bank knew on other occasions that *Brereton* was in the habit of issuing checks beyond the prescribed distance, the Court must assume a similar knowledge on the present occasion. As to *Swan v. Bank of Scotland*, the reason of the judgment is directly in favour of the respondents, more particularly on the point of the balances, which were held not to furnish any defence against the penalties of the stamp act; and the reason given for the judgment in *Philpots v. Jones (a)* is in favour of the respondent. There was no settled account: the annual account was an account current for the purpose of settling on what sum interest should be paid.

As to the unpaid bills:—The Norwich Bank states they forbore to present them, in order to maintain appearances and their credit,—not on account of any agreement. As to *Brett v. Levett (b)*, the question was not whether the conversation was a discharge, but whether a declaration by the bankrupt after bankruptcy was sufficient; but it was not decided that such declaration dispensed with the necessity of notice, and the case is considered of doubtful authority in the books of practice. The offer of composition by *Ehwall*, the acceptor, proves he had some effects; but if he had not, yet it has been decided that known insolvency or bankruptcy of the drawer does not dispense with the necessity of notice of dishonour to him; *Easdale v. Sowerby (c)*, and many other cases. (*d*)

1836.

Ex parte  
BIGNOLD.

In the matter  
of  
BRERETON.

(a) *Philpots v. Jones*, 2 Adol. & Ellis, 41.

(b) *Brett v. Levett*, 13 East, 213.

(c) *Easdale v. Sowerby*, 11 East, 114.

(d) *Ex parte Johnston*, 1 Mont. & Ayr. 622, and the cases there cited; and see *Boulton v. Stubbis*, 18 Ves. 21., and *Clegg v. Douglass*, 3 Bos. & Pull. 239.



1836.

—  
*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 BREBRETTON.

The drawers shutting up and abandoning their shop is not sufficient to dispense with the presentment of the note; *Bowes v. Howe*. (a) Even an order given by the drawers not to pay the bill does not dispense with necessity of presentment; *Hill v. Heap*. (b) And where the drawer informed the holder he would endeavour to procure effects, and call on him again, it was held not to supersede the necessity of presentment. (c) The general rule is, that if the indorsee of an inland bill present it for acceptance, which is refused, and delay giving notice to his indorser, the latter is discharged; *Goodall v. Dalley*. (d) The drawer or indorser, after being arrested, offering to give a bill by way of compromise, does not dispense with the necessity of notice; *Cumming v. French*. (e) [The CHIEF JUDGE:—Words said by way of compromise of an action are never receivable in evidence in that action. (f)] An offer by an indorser to pay part of the amount, with costs, will not dispense with notice; *Standage v. Creighton*. (g) A promise by a drawer to pay a bill does not dispense with the necessity of notice to the drawer; *Pickin v. Graham*. (h)

In *Borrodaile v. Lowe* (i) a letter was written by the indorser of a bill who had been applied to for payment, after several days laches, telling the plaintiff that he would not remit the amount till he received the

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(a) *Bowes v. Howe*, 5 Taunt. 30, reversing *Howe v. Bowes*, 16 East, 112; and see 3 Taunt. 399, note.

(b) *Hill v. Heap*, D. & R. N. P. C. 57.

(c) *Prideux v. Collier*, 2 Stark. 57.

(d) *Goodall v. Dalley*, 1 Ter. Rep. 712.

(e) *Cumming v. French*, 2 Camp. 106, note.

(f) See, however, *Dixon v. Elliott*, 5 Carr. & Pay. 437.

(g) *Standage v. Creighton*, 5 Carr. & Pay. 447.

(h) *Pickin v. Graham*, 3 Tyrw. 923, S. C. 1 Cr. & Mee, 725.

(i) *Borrodaile v. Lowe*, 4 Taunt. 93.



bill, and desiring the plaintiff, if he considered him (the defendant) unsafe, to return the bill to another prior indorser, was held no waiver by the defendant of the right to notice of dishonour. A bill must be presented to the drawer, or the indorser is discharged.

1836.

*Ex parte*  
BIGNOLD.

In the matter  
of  
BREBETON.

*Lambert v. Oakes. (a)*

In *Whitfield v. Savage (b)*, A. lent to B. an accommodation bill drawn by A. and accepted by C., who had effects of A. B. indorsed to D., who indorsed over. The day before it was due B. paid the amount to A., who hearing C. had failed, gave B. a check for the amount, and sent him with it to D., to enable D. to pay it when due. Four days after it was due A. desired D. not to pay, as no notice of dishonour had been given by the holder, but D. paid. Held, done in his own wrong, and that A. might recover the amount from D. [Sir John Cross : — There is another very strong case, that of *Baker v. Birch (c)*, where the acceptor, a few days before the bill was due, informed the drawer he should not be able to pay, and told the drawer he must take it up, and gave him part of the amount to assist in so doing, and the drawer received the money, and promised to take up the bill. It was held, in an action by the indorsee against the drawer, that the drawer might set up as a defence the want of presentment and notice of dishonour.]

In *Phipson v. Kneller (d)* notice was dispensed with; but there the drawer had told the holder, before the

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(a) *Lambert v. Oakes*, 12 Mod. 244. *Forster v. Jurdison*, 16 East, 105.

(b) *Whitfield v. Savage*, 2 Bas. & Pull. 277. (d) *Phipson v. Kneller*, 4 Camp. 285, S.C. 1 Stark. 116. Ignorance of the drawer's residence

(c) *Baker v. Birch*, 3 Camp. 137; and see the same point in dispenses with notice, if due dili-



1836.

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*Ex parte*  
 BIGNOLD.  
 In the matter  
 of  
 BREBETON.

bill was due, that he had no regular place of abode, and would call and see the bill paid. It is true that notice of dishonour need not be given to the drawer when he had no effects in the hands of the drawer either at the time of drawing the bill or when it became due; *Bickerdicke v. Bollman*. (a) But the allegation that these were accommodation bills, and therefore notice of dishonour not necessary (b), is not established. The other side must prove the fact: *prima facie* all bills are taken to be for consideration.

The only case which apparently runs counter to this current of decisions is *Dixon v. Elliott* (c), where, in an action against the indorser of a bill, it appeared that two months after it was due it was shown to him, and inquiries made concerning the drawer and acceptor, on which he said, if the holder would take 10s. in the pound he would secure it; and this was held sufficient to dispense with notice of dishonour; but that was a peculiar case of exception to the general rule. In any event the proof ought to be suspended till after the choice of assignees; but the commissioners were right in rejecting the proof.

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gence were used to discover it; *Browning v. Kinnear*, *Gow*. 81; *Williams v. Germaine*, 7 *Barn. & Cres.* 486, S. C. 1 *Moo. & Ry.* 394. Mere inquiry where bill is payable is not due diligence; *Beveridge v. Burgis*, 3 *Camp.* 262; and see *Firth v. Thrush*, 2 *Mau. & Ry.* 359, S. C. 8 *Barn. & Cres.* 387. "Due diligence" is a question of fact; *Bateman v. Joseph*, 12 *East*, 433, S. C. 2 *Camp.* 461; *Goodall v. Dolley*, 1 *Ter. Rep.* 712; though the contrary has been held in the Exchequer; *Sturgis v. Derrick*, *Wightw.* 76. (a) *Bickerdicke v. Bollman*, 1 *Ter. Rep.* 405; and see *Clegge v. Cotton*, 3 *Bos. & Pull.* 239. (b) *Sharpe v. Bailey*, 4 *M. & R.* 4, S. C. 9 *B. & C.* 44; *Sisson v. Tomlinson*, 1 *Schw. N.P.* 346; *De Berdt v. Atkinson*, 2 *Hen. Bl.* 336. (c) *Dixon v. Elliott*, 5 *Carr. & Pay.* 437.



*Per Curiam* : — The reply may be confined to the question, — necessity of presentation and notice of the nonpayment of the bills of exchange.

1836.

*Ex parte*  
BIGNOLD.  
In the matter  
of  
BREBETON.

Sir *W. Follett* in reply : — No doubt the general rule is, that bankruptcy or insolvency of the drawer will not dispense with the necessity of notice to him of dishonour; but this notice is for the benefit of the parties liable on the acceptor's default. But if the drawer, either directly or indirectly, by acts or by acquiescence, agrees to waive the necessity of notice, then it becomes unnecessary to give notice of presentment and dishonour. Letters are frequently sent by the drawer to the holder of a bill, asking that the bill may not be presented; and no merchant ever imagined that complying with such a request discharged the drawer. The question in *Brett v. Levett* (a) was, whether the words used were sufficient, having been uttered after the bankruptcy; if they had been spoken before bankruptcy, no doubt could have been entertained. Most, if not all, these bills were accommodation bills, and therefore no notice was necessary to the drawer of dishonour. (b) The authority of the cases cited is not disputed; the question is, was not the necessity of presentment for payment waived by the bankrupt? The proof ought not to be postponed till after the choice of assignees. It was decided in *ex parte De Tastet* (c), that there was no jurisdiction to reject a debt on the

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(a) *Brett v. Levett*, 13 *East*, 213.

(b) See notes (a) and (b), *ante*, p. 646.

(c) *Ex parte De Tastet*, 1 *Ves. & Bea.* 281, S. C. 1 *Rose*, 324.

But it was held in that case that the Great Seal could control any unjust use of that power, by removing him, or by some arrangement.



1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BRERETON.

ground that it must command the choice of assignees, and that the creditor had an interest adverse to the general creditors by security obtained immediately before the bankruptcy.

The CHIEF JUDGE: —

This is an application by *Bignold*, agent to the Norfolk and Norwich joint stock bank, for leave to prove a debt rejected by the commissioners on several grounds, one of which was, that *Bignold* was not the proper person to prove; this is not worth considering; for though the commissioners could not allow the proof without an order, yet the practice of this Court is to make orders to enable parties to prove who are not legally entitled. But the principal question is, whether the petitioner can claim payment from the bank of the sums advanced in manner stated; and if they can be proved, a second question arises, viz. whether the debt has not been part discharged by receipt of bills drawn by *Brereton* on a third person, but not presented for payment, nor notice of dishonour given.

The first point is, whether there exists any debt in respect of the advances made by the bank to *Brereton*. There were two classes of transactions. The greater proportion of the advances were made by *Waller*, the agent of the banking company, and who managed a branch bank at Foulsham. The bankrupt, who was a banker there, arranged with the Norwich company that *Waller* should furnish him with money, as follows:— When the bankrupt wanted money he sent a servant with a letter to *Waller*, who returned the money. On Thursdays he usually wanted a large sum, and on Thursday in every week he drew a check for the whole amount received during that week, which *Waller* sent to Norwich, as a means of his (*Waller's*) being credited



for that sum. It is said, that such advances are made in contravention of the Stamp Act (*a*), and consequently cannot be set up in account as payments. The agent knew the circumstances under which the drafts were drawn, and therefore the company must be held to have had notice. Then is the transaction within the clause in question? The legislature, having imposed certain duties on bills, excepts bankers drafts; and, to avoid any evasive transactions, clause 13. (*b*) is added, rendering it necessary that the draft should be dated the very day of the apparent date, and should bear the name of the place where issued; but for this clause, a check might be post dated, which would be the same as drawing a bill of exchange. It is clear the parties had no intention to evade the act; still, if the transaction comes within the forfeiture of the statute, this Court must enforce the law. [The Chief Judge here read the clause, *ante*, page 637, and proceeded:—] It appears to be admitted that the drafts in question were post dated, and, though dated at Norwich, were drawn more than ten miles from Norwich. But to be within the act it must be such a bill as “before mentioned,” and paid by the bankers knowingly. It is not necessary to go back to the very early part of the section in order to fully interpret this 13th clause; I will refer back to “any bill, draft, or order.” What bill does this refer to? One for “payment of money to the bearer on demand” when it shall be “issued.” The check, therefore, to be within the clause, must be dated subsequently to the day of issue, or not truly state the place where issued. The “issuing” is the very essence of the question. To satisfy this word “issue” there

1836.

*Ex parte*  
BIGNOLD.  
In the matter  
of  
BREBETON.

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(*a*) See the section, *ante*, page 637, note (*a*).

(*b*) See *ante*, page 637.



1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BRERETON.

must exist a draft for money in the hands of some person entitled to demand cash for it. A bill of exchange is not issued till in the hands of the party entitled to demand the money; till then it may be altered without rendering a fresh stamp necessary. The checks in question were never issued, nor ever intended to be issued. They were given merely as vouchers to the agent that he had advanced so much money to *Brereton*; and they were not within the mischief nor the words of the clause, which contemplates a draft issuing before payment. These drafts were not drawn till after payment. If *Waller* had advanced cash to the bankrupt out of his own monies, and the check had been given to enable him to procure money thereon from the bank, and repay himself, that would be within the clause.

It has been argued, that if the Court holds these drafts not within section 13., a consequence will be, that if a person gives a check to a servant, who carries it to a creditor living beyond the prescribed distance, it would become bad. If a check be actually drawn for the purpose of having money afterwards paid thereon to another party, it is issued the moment it is delivered to the servant to carry to the distant creditor; as putting a letter containing a libel into the post is issuing it.

But there are other checks payable at Norwich drawn by the bankrupt at Brinton or elsewhere more than ten miles from Norwich for the purpose of being issued, and issued to creditors who obtain payments thereon at Norwich. These are clearly within the 13th section, so far as the person issuing is concerned. All that remains to be established is the knowledge of the person paying, of the fact that they were drawn more than ten miles beyond Norwich; for the act says, the illegal drafts must be paid by the bankers knowingly. If there were any conflict in the evidence on that point,



an inquiry would be proper; but there is no evidence that the Norwich bankers knew the drafts were drawn elsewhere than appeared on the face. It is argued that the Court must assume the fact of the knowledge of the bankers, because they knew that *Brereton* was in the habit of so doing on other occasions. It would not be proper to assume as a fact what, if such, might have been proved. No further inquiry is necessary on that point; and the bankers are entitled to prove the amount advanced on such checks.

It appears that there was an account between the parties, and payments made by the bankrupt on account, of which part of the amount consisted of bills of exchange, of which some were not paid, but proper notice of dishonour was given. Others were drawn by the bankrupt on and accepted by a third person; but they were never presented for payment, nor notice of dishonour given to the bankrupt, the drawer. These bills must be treated as so much money paid, and their amount deducted from the proof. It is said the bankrupt waived the necessity of presentment and notice; if so, the rule preventing proof would not apply; but the evidence does not sufficiently prove the fact. On the 27th of January one of the bills became due, was presented, and not paid. A meeting was thereon held; the acceptor proposed a composition on that and other bills becoming due and accepted by him, stating his inability to pay, and that he had not and should not make any provision for their payment. It was a mere offer. Besides, he might have altered his intention, and have paid the bills. It was further urged, that the bankrupt waived the necessity of presentation: he was liable if the acceptor did not pay: it was therefore his interest to persuade the holders to accept the composition from the acceptor. If that had been done he

1836.

—  
*Ex parte*  
BIGNOLD.  
In the matter  
of  
BARRINGTON.



1836.

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*Ex parte*  
BIGNOLD.  
In the matter  
of  
BREKETON.

would have been released. The bank rejected the proposal; and one proof thereof is, that next day they presented another bill. The acts of the bankrupt did not amount to a waiver of the necessity of presentation and notice of dishonour; and the value of these bills must be deducted from the amount of the proof.

*Sir John Cross : —*

This has been said to be an appeal from the decision of the commissioners, for the reversal of which good cause must be shown. This is a mistake frequently made, and should be set right. An appeal is properly a removal of a cause to a superior Court, when no new evidence can be adduced. This, then, is not an “appeal,” but a complaint of improper rejection of a proof, admitting or rejecting which by commissioners is a ministerial act, so that the Court are now exercising original jurisdiction.

I agree with the Chief Judge, that the question of form, who is to tender the proof, is easily arranged.

I am of opinion that checks are not “issued” within the meaning of the act till a third person takes part in the transaction, and that for a customer to sign a check whereon to draw out his own money for himself is not issuing the check. It has been said in argument, that the check was given in favour of *Waller*, and to enable him to receive money thereon, but that is not in evidence; he had authority, by letter from the Bank, to answer the checks of the bankrupt. The course of dealing was, sometimes the bankrupt wrote letters, sometimes he sent a servant to *Waller* for cash, and, at the end of the week, *Waller* receives a check as a voucher only, not with any intent of being “issued,” which takes it out of section 13.

As to the other checks, did the Norwich bankers



know the fact of the issue beyond the prescribed limits? There is no evidence that they did; the only scintilla of evidence is by one *Kendall*, who says he has no doubt they knew. This is not sufficient proof to enforce a penalty.

1836.

*Ex parte*  
BIGNOLD.

In the matter  
of  
BRERETON.

The Court are asked to grant further inquiry; first, to prevent the petitioners voting in the choice; second, to enable the respondents to collect better evidence, in order to enforce a penalty. It appears to me that it would be most unjust to exclude petitioners from voting in the choice, and I perceive no reason for further inquiry or delay.

The point touching the dishonoured bills is a matter of fact,—not of law or bankruptcy; the question being, was it the distinct understanding of all parties, that it would be unnecessary to present the bills and give notice of dishonour to the drawer? On this point I feel great difficulty, which is increased by hearing the opinion of the Chief Judge. The parties did not, indeed, actually come to an agreement for a composition; but if, at the moment they parted, the bankers had asked *Brereton*, “Do you wish us to go through the form and expence of presentation and notice?” would not the answer have been, “Certainly not.” This was not said, but was it not understood? Our decision is final as to facts, and the respondents ask for the opinion of a jury; and I would suggest whether there should not be an issue as to whether it was or not the understanding of the parties, that presentation and notice were unnecessary.

*Sir George Rose* : —

I think no practical difference of opinion will exist in the Court, and that a jury will not be found necessary. The subject has been thoroughly argued, and I would



1836.

*Ex parte*  
BIGNOLD.In the matter  
of

BREBETON.

In general  
where commis-  
sioners reject  
a debt *in toto*,  
they should not  
adjourn the  
choice of as-  
signees to enable  
the petitioner to  
present a peti-  
tion to prove.

not add any thing to what the other Judges have said, if I did not conceive it might be more satisfactory to the parties.

The petitioners claim to be creditors for a large amount, and part of the debt is covered by security, and they, without waiting to have it sold, now ask to take it at a stated amount, and prove and vote in the choice of assignees. If there were no objection alleged against the debt, the mere fact that the security was unsold, and not given up, would render it rather too strict to prevent them voting in the choice. The commissioners have adjourned the choice, to enable this petition to be presented; but in general, when commissioners reject a debt *in toto*, they should not adjourn the choice. In the election of assignees the great point is to secure the payment of the dividend; that is the right of the creditor, to which his right to vote in the choice is secondary.

If the objection made to this debt could have been carried before a jury, we might have reserved the dividends, and have allowed the assignees to try the question, by proceeding for the penalties; but as the law officers of the Crown can alone do that, the only action the assignees could bring would be to recover the property, which, as it would have been defeated by proof of any the slightest lien existing in the Norfolk and Norwich bank, would not be of any practical utility.

There are three questions:—1. The want of notice of dishonour of the bills. 2. The checks given to *Waller*. 3. The drafts given to third persons.

1. I should agree with Sir *John Cross* as to the dishonoured bills, if this were a petition to expunge a proof already admitted, because then our decision, being on a question of fact, would be final. Here, if the parties think they can succeed, they may again go before the commissioners, and tender a proof on these bills, as not



having been given for any consideration, and therefore requiring no notice of dishonour to the drawer. The conversations and intentions of parties as to the bills are to be tested by what was done. When the petitioners rejected the offer of compromise, the affair was at an end, and the parties entitled to notice.

2. As to the checks given to *Waller*, the transaction was not an "issuing" of a draft payable to bearer on demand; it was not to be paid to the bearer; it was a voucher only.

3. The evidence as to the drafts does not enable the Court to arrive at the conclusion contended for by the respondents. The commissioners have assumed the knowledge of the Norwich bank, from an inference drawn from the fact that the bankrupt resided more than ten miles from Norwich; but the onus of proving this lay on the estate, and parties might have been summoned and examined. As it is, there is no evidence before the Court of the "knowledge" of the Norwich bank.

The Court does not now decide who is to prove. If there be any objection that may be insisted upon before the commissioners. The decision now is, that there is a debt to be proved. It may perhaps be urged on behalf of the estate, that the petitioner is only to prove some of the debt, and that all the variations in the firm cannot be condensed, especially as the act of parliament has not been complied with; if so, the petitioner can only prove as a member of a partnership, and nice shades of proof may exist which may vary the right of proof as a partner. *Bignold* is either the officer to prove the whole debt, or a partner to prove what was due to the firm while he was a partner.

It is admitted the parties wish to elect themselves or their nominees to be assignees; but as their debt is

1836.

*Ex parte*  
BIGNOLD.

In the matter  
of  
BREBETON.



1836.

*Ex parte*  
BIGNOLD.In the matter  
of  
BRERETON.

challenged, and their security not realized, the order must protect the estate to the length that if they are elected assignees the petitioning creditor must have liberty to act alone as to these parties and their securities. *De Tastet's* case (a) was not affected by security; it was an absolute right to prove.

Liberty to go in and prove. No costs to petitioner. Assignees' costs out of estate.

HOUSE OF  
LORDS.  
July 6,  
1835.

SWAN v. The BANK of SCOTLAND. (b)

THIS day judgment was delivered. The facts are fully stated in the judgment.

A bond to pay all sums a trader may owe a banker does not cover balances, part of the items of which consist of sums paid by the banker's agent on drafts illegal within section 13 of 55 Geo. 3. c. 184.

Lord Brougham : —

My Lords,—The Scottish banks, both public and private, have, for more than a century past, been in the practice of granting accommodation to their customers by way of what is called “cash credits,” a mode of conducting business which may almost be said to have become classical, from the description and commendation given of it by Mr. *Hume* in one of his most celebrated political essays. It consists in the opening an account to a certain limited amount with the customer, on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the banks, and these are

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(a) *Ex parte De Tastet*, 1 Rose, the preceding report, and, as it is not in print, is here given.  
324. S. C. 1 Ves. & Bea. 281.

(b) This case is referred to in



honoured up to the specified amount. During the whole period of the party's occasion for this accommodation he pays interest for the sums drawn, and thus he only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, besides the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring from them the state of his circumstances.

*William Martin*, writer, of Lockerbie, obtained a credit of this description with the Bank of Scotland in June 1819, and gave a bond for securing the latter, in which he was joined by Mr. *Swan*, the present appellant, and others, formally and nominally, as principal co-obligors, but in reality as his sureties. In September 1825 this was extended to 10,000*l.*, and the sureties joined in a second bond, whereby they became liable in the same manner with *William Martin*, to the extent of 5,000*l.*, "for all such money as should be drawn out from the bank, or its agency office at Dumfries, or as might be respectively owing, due, paid, payable, or claimable, or any draft, orders, bills, notes, receipts, guarantees, letters, documents, or obligations whatever, drawn, accepted, granted, indorsed, or any how signed by *William Martin*, or by procuration, or liable on him by any legal construction, and chargeable to the said account." And it was further stipulated by the bank, that any account or certificate signed by their principal accountant, or by their agent at Dumfries, should be sufficient to ascertain and constitute the sums or balance to be due on principal and interest, and should warrant all execution of law against the obligor, jointly and severally, for such sums and balances. *William Martin* continued to operate upon this credit until he became insolvent and was sequestered, when a balance of

1835.

—  
SWAN  
v.  
The BANK  
of  
SCOTLAND.



1835.

—  
SWAN  
v.  
The BANK  
of  
SCOTLAND.

4,378*l.* 0*s.* 11*d.* principal, and 326*l.* 10*s.* 2*d.* interest, was due upon the account. The sureties or cautioners were sued upon the bond, and it was stated in the defence, that the manner of drawing had been chiefly in two ways: *William Martin* had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer, and sometimes he had discounted bills, and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank or bank agent. In order to save the stamp, it is alleged he made them payable to bearer; but as Lockerbie is said to be beyond the distance of ten miles from the bank, he dated the checks at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office.

Docquets and balances certified by both the accountant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the Second Division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond, that of 1,825*l.*, the pursuer could not recover on the bond of 1819 in this action, but their lordships decreed in his favour upon the former instrument.

Nothing here turns upon the form of the action, which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transactions were averred; and the facts alleged by the parties being in many, indeed in most particulars, denied on either side, nothing is to be taken for concluded or ascertained by the process. But the respondents, the chargers, were sufficiently confident in their grounds of law to let the case be determined upon the fact of admitting, for argument's sake, the allegations of the



appellants, the suspenders; and as it was on this assumption that the court below decided, so it is upon this that the appeal is brought, and that your Lordships are called upon to determine here.

It is to be regretted that some steps have not been taken to ascertain the facts, the more especially as the matter of law was, in the estimation of the court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could have attended this settlement of the facts, for nothing material was in dispute except the facts of the drafts having been such as the appellants contend they were; namely, payable at *Dumfries* and drawn at *Lockerbie*; of their having been issued to parties to whom *William Martin* was paying money; of *Lockerbie* being above the legal distance; and of the bank agents being aware of all this. The facts, being probably denied only for form's sake, would have been easily substantiated. I suppose there will not be any difficulty in admitting these facts if the cause is remitted. What part of the balance was made up of money obtained on such drafts, and what part on letters sent for money to be transmitted from *Dumfries* by *William Martin's* messenger, would probably have been ascertained with equal ease, and these are the only facts in the case. The consequence of settling these things would have been, that should the point of law be decided against the respondents the cause would have been at an end; whereas, if your Lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspenders allegations. However, we have to deal with the case as it is now before us, and I regret to find that I cannot come to the conclusion at which the learned Judges below have arrived. On the contrary, I really hold it to be, without any reasonable

1835.

—  
SWAN  
v.  
The BANK  
of  
SCOTLAND.



1835.

SWAN

v.

The BANK  
of  
SCOTLAND.

Letters or orders for money sent by the hands of the servants of a person having credit with a bank more than ten miles from the customer's residence, and on which money is paid, are not "drafts or orders" for payment of money within section 13 of 55 Geo.3. c. 184.

doubt, clear, that, upon the facts which the case for the respondents' assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of and turns upon the stamp act (55 Geo. 3. c. 184. s. 13.), and we may at once lay out of view that portion of the alleged balance or debt which arose from letters or orders such as those set forth in the cases; namely, directions given at *Lockerbie* in writing to the bank agent to send *William Martin* sums of money. I do not consider that these are drafts or orders for the payment of money at all; they are directions to send money to the party who either has it in the bank or takes it on credit from the bank; they are not negotiable instruments at all, and they are not issued: therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section. But we are to consider the point argued and decided below, whether, upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques issued at *Lockerbie* beyond the privileged distance, the agent who honoured those cheques being cognizant of the distance and the place of issue, the co-obligors or sureties in *William Martin's* bond of 1,825*l.* were liable to make good *William Martin's* deficiencies; in other words, to pay the debt found due and arising out of such dealing.

Now it must first of all be observed, that the main though not exclusive ground upon which the respondent rests his case, and the court below their judgment, is this, that the bondsmen had bound themselves by the certificate of the accountants or agents of the bank, and that whatever balance those persons should certify was to be regarded as the true balance for which they were liable to the bank. This argument seems to admit that



but for such a special provision between the parties, the want of a stamp would be fatal. But certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue and other statutory provisions; we shall therefore begin by considering the question in its more general shape, and then enquire if the special obligation just adverted to makes any difference in the present case.

First, there seems no reason to doubt, that if for the purpose of protecting the revenue any thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it; thus, if dealing in tobacco without a licence is prohibited under a penalty, this will not prevent the person who so dealt from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty; *Johnson v. Hudson*. (a) But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear that in this case no action could arise from such void dealing, not because the law forbid the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a provision framed to protect the buyer, an action was held not to lie where that prohibition was broken; *Law v. Hodson*. (a) So no

1835.

SWAN  
v.  
The BANK  
of  
SCOTLAND.

Forbidding a thing under a penalty to protect the revenue does not make void the thing, if done, nor prevent an action thereon.

If a thing is prohibited for other than revenue purposes no action lies thereon.

(a) *Johnson v. Hudson*, 11 East. 180.

(b) *Law v. Hodson*, 11 East. 300.



1835.

—  
 SWAN  
 v.  
 The BANK  
 of  
 SCOTLAND.

action was held maintainable for printer's work where the act requiring the printer's name to be given had not been complied with, not following the direction being held equivalent to disobeying a prohibition; *Bensley v. Bignold*. (a) But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy, as any such prohibition. Be it so, that the provision is to protect the revenue, still if it operates not by penalty, nor yet by mere prohibition, but by declaring void what is prohibited, surely this is as immediate and direct a defeazance of all legal remedy as can be conceived; it is not, as in *Law v. Hodson* (b), a consequence drawn by argument from the statutory enactment, but is the very enactment itself; it stands in the place of penalty; it is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits 100*l.*, and forfeits also the validity of his contract; he incurs two penalties,—the fine and the nullity.

Now what does the stamp act provide with reference to the present case? The 13th section (c) is precise. [His Lordship here read the first part of the section.]

Thus far all is description, and penalty, and statement of the purpose; namely, to prevent fraud and evasion of the duties. But there follows a clear declaration of nullity or avoidance, for it goes on to provide that over and above forfeiting the penalty the banker or other person shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or from whom such bill, draft, or order shall be drawn, or his, her, or their executors, administrators, or

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(a) *Bensley v. Bignold*, 5 *Barn. & Adol.* 335.

(b) *Law v. Hodson*, 11 *East*, 300.

(c) See the section, ante, page 637, in note (a).



his or their assignees or creditors in case of bankruptcy or insolvency, or any other person or persons claiming under her, him, or them. To say that a party shall not be allowed in account any money paid in a particular way is equivalent to saying that the party shall have no claim against the payee or person on whose account or for whose behalf the money was paid; or, in other words, that no credit should arise to the party, and, which is the same thing, no debt should be incurred towards him by the other party. The statute has therefore in terms said, that no debt shall arise from dealings contrary to the stamp provisions, and in all but express terms, that whatever is done shall be void.

This is any thing then rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, by declaring that payments upon unstamped instruments, made by parties knowing that the instruments do not come within the exemption, shall not be valid to the effect of charging the payee with a debt to the party paying.

Secondly. Now what is the ground of the bank's action of the charge given against *William Martin's* co-obligors or sureties? It is the debt alledged to be due from him to the bank in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrong-doer is forbidden from having any claims against the cautioner in account, there is no liability incurred by the co-obligor, or indeed by *William Martin* himself. That is the immediate and direct consequence of the statutory provision. It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due—no

1835.

—  
SWAN  
v.  
The BANK  
of  
SCOTLAND.



1835.  
 —  
 SWAN  
 v.  
 The BANK  
 of  
 SCOTLAND.

balance—the obligation to make that good itself amounts to nothing. The operation of banking is this:—We speak of deposits by customers, and of their keeping money at a banker's; but both in fact and in contemplation of law they give their money or securities for money to the banker, who becomes their debtor, and is bound to repay it on demand. So the operation of a cash credit is the reverse of the former: the customer becomes the debtor to the bank by so much as the bank advances on his drafts, and the surety becomes bound to pay that debt if the customer fails. Then, if the statute says no debts shall arise or become due upon money drawn out by the customer or paid by the banker in a particular way, it also says, that no bondsman shall be liable on such a security given. It is as if the cash credit stood, and the bond for securing the balance stood, but nothing had been done under the credit, and so no balance had arisen or could arise which the bondsman could have to make good.

Balance.

But the peculiar form of the bonds is relied upon. It is said that whatever the accountant or agent should certify as the balance is to be taken as that balance. How can this alter the case? They are to ascertain the quantum. The quantum of what? Of balance or debt due to the bank. But the act of parliament has said that there can out of transactions of this kind arise no debt whatever. Then there is no balance of a debt for the certifier to ascertain. The words taken even most literally will not bear out the contention of the respondents, "any account or certificate signed as provided shall be sufficient to ascertain, specify, and constitute." What? Not how much the obligors shall be bound to make good or pay, but "the sums or balances such as aforesaid to be due hereon in principal and interest, and shall warrant all executrals for such sums or balances."



Now what are balances such as aforesaid? They are plainly balances in the transactions aforesaid; the drawing money out and paying it in; in a word, the balance of debt due from *William Martin* to the bank. And how are they further described?—as “to be due hereon in principal and interest.” This plainly means due on this bond by reason of the claims arising to the bank for money advanced on *William Martin*’s cash credit; so that the obligation is to pay the balance or debt arising and due. If there is no debt,—no claim,—there is no obligation. The statute has taken away the debt, and the obligation vanishes with it. It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, what is the main purpose of it, and to which all besides is accessory and ancillary: it is, that the obligors are bound to pay any debt incurred by *William Martin* to the bank on his cash credit; now, if there could be no debt, there must be an end of the obligation to pay. Nothing can be more plain than that if such decisions as the present could be supported, the 13th section of the statute becomes at once a dead letter, as far as the nullity goes; for parties could only have to frame their securities like these bonds of June 1819 and September 1825, and then the unstamped cheques would constitute a balance available to the one party and payable by the other; for then it would always be contended, and with success, that the party was not suing for money paid by unstamped drafts; that would be admitted to be impossible, by virtue of the 13th section; but he would be represented as suing on the balance declared by the account, and the parties would thus be concluded, and the Court precluded from going into the fraudulent and illegal dealing, which had rendered the whole dealing void, by prohibiting any claim or debt from arising out of it. All drafts, whether written ten or

1835.

SWAN  
v.  
The BANK  
of  
SCOTLAND.

Accounts taken  
and balances  
struck do not  
prevent the pe-  
nalties of  
55 Geo. 3.  
c. 184. s. 13.



1835.  
 ———  
 SWAN  
 v.  
 The BANK  
 of  
 SCOTLAND.

beyond 400 miles, whether payable to bearer or not, whether on demand, at sight, or at six, or twelve, or eighteen months' date, would become valid, because a single bond executed would make the party drawing and receiving liable; nay, without even paying a bond stamp, a written memorandum agreeing to pay, and with an agreement stamp affixed to it only when it was to be put in suit, would suffice to legalize the whole transaction, as far as efficiency in law and equity is concerned; the statutory protection to the revenue, of the nullity declared, would be gone, and the penalty alone remain.

A recent case in the Exchequer, *Owens v. Denton (a)*, was relied on for the respondent; but it is in no respect repugnant to the opinion which I have been giving. There a settlement of accounts had taken place upon a selling of malt by an illegal measure; the Court admitted explicitly that such a sale could not either be enforced by action, or set off in defence against a claim; but they held that the settlement was equivalent to payment, and could thus be set off. It is quite unnecessary so say whether this was or not a correct view of the law; and whether it let in or not plain evasion of the revenue; at all events it does in no way conflict with the grounds of the present case, which stand wholly separate and apart.

I am, therefore, of opinion, and would move your Lordships, that the decree appealed from must be reversed, and that the case must be remitted, with a declaration to this effect:—That no obligation arises upon this bond to pay any balance alleged to be due to the bank on *William Martin's* draft, in so far as these were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent to be drawn beyond such distance, or to

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(a) *Owens v. Denton*, 1 *Crompton & Roscoe*, 711.



be wrong dated in point of place, or to be wrong dated in point of time; and in so far the Court will be directed to suspend the charge, and to find expences due, according to the result of the enquiry touching the manner in which the balance is constituted.

1835.  
—  
SWAN  
v.  
The BANK  
of  
SCOTLAND.

Ordered accordingly.

*Ex parte* WILKS. — In the matter of TARRANT.

C. of R.  
1836.  
June 2.

THIS was a petition to annul the fiat for want of trading and petitioning creditor's debt, presented by the assignees and an execution creditor under a distress for rent.

One single instance of trading insufficient, when intent to trade generally is not proved.

The fiat issued against *Mary Tarrant* described her as a milliner and lodging-house keeper. *Tarrant* filed an affidavit in opposition, swearing that she was a milliner and lodging-house keeper, and a lady deposed that she on one occasion supplied materials to *Tarrant* as a milliner, who made them up into a dress, and was paid 1*l.* 5*s.* for so doing.

A lodging-house keeper, not proved to have sold provisions, is not a trader.

Assignees should not join with a creditor having an interest adverse to the fiat in a petition to annul.

Mr. *Swanston* and Mr. *Stinton* for the petition.

Mr. *F. V. Lee* and Mr. *Sturgeon* for the petitioning creditor:—The evidence of trading as a milliner is sufficient; one instance of trading being sufficient to support a fiat; *ex parte Mole* (a); besides which *Tarrant* was a pri-

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(a) *Ex parte Mole*, 14 *Ves.* 603. the jury. *Ex parte Maginnis*,  
The question of trading depends 1 *Rose*, 84. *Patman v. Vaughan*,  
not upon the quantity but the 1 *Ter. Rep.* 572.  
intent, which is a question for



1836.

—  
*Ex parte*  
 WILKS.  
 In the matter  
 of  
 TARRANT.

vate lodging-house keeper, which is a trading; *Smith v. Scott.* (a) The assignees here join in a petition to annul the fiat, which they ought not to do, it being their duty to uphold it. (b)

Sir *George Rose* : — I am at present inclined to dismiss this petition, if possible, on account of the parties who are the petitioners. The execution creditor and the assignees not only have distinct but adverse interests; and parties having adverse interests cannot join as plaintiffs; *Cholmondeley v. Clinton.* (c) *Wilks* is actually adverse to the fiat; but though assignees may call on the petitioning creditor to support the fiat (d), and come amicably to seek protection, they ought not to join in a petition decidedly adverse to the fiat.

Mr. *Swanston* in reply : — The assignees are responsible for the validity of the fiat, and have a right to come here to annul. They think that the fiat cannot be supported, and they call on the petitioning creditor to remove those doubts. In *Cholmondeley v. Clinton* (e), an heir and devisee, claiming adversely to each other, joined in a suit against a third person, which was held could not be done; here the parties are not adverse; the execution creditor joins with the assignees in alleging that the fiat is invalid.

(a) *Smith v. Scott*, 9 Bing. 14 S.C. 2 Moo. & Sc. 35.

(b) A petition by assignees to annul is watched with great jealousy. *Ex parte Burnell*, 1 Mont. & Ayr. 44.

(c) *Cholmondeley v. Clinton*, 1 Turner & Russ. 116. And see

*ex parte Somers*, 1 Molloy, 431., deciding that the assignees and a bankrupt disputing his bankruptcy cannot join in a petition.

(d) *Ex parte Graves*, 1 Gl. & J. 386.

(e) *Cholmondeley v. Clinton*, 1 Turner & Russ. 116.



Mr. *Swanston* was proceeding to read part of the depositions on the proceedings.

1836.

Mr. *F. V. Lee* objected it could not be done, as no notice to read them had been given.

*Ex parte*  
WILKS.  
In the matter  
of  
TARRANT.

*Per Curiam* : — When assignees apply to annul the fiat, the Court may look at the proceedings, to see what is the state of the evidence as between the assignees and the estate. Here *Wilks* petitions to annul the fiat of *Tarrant*, and then the rules of evidence applicable to adverse litigation apply. Therefore the depositions on the proceedings cannot be read without notice. As against the petitioning creditor these proceedings might be read without notice, as he must be supposed to know the evidence in support of his fiat; but they cannot be read without notice as against the bankrupt.

THE COURT here offered the petitioning creditor an issue as to the fact whether *Tarrant* was a trader as a milliner, which was declined.

THE CHIEF JUDGE : — A person may be a lodging-house keeper without being a trader; and there is no evidence in this case of trading by buying and selling provisions, or otherwise trading within the act, as a lodging-house keeper. As to the trading as a milliner, an issue was offered and rejected. My mind is in doubt as to whether the trading as a milliner is sufficient to support the fiat, and the petitioning creditor declines to remove that doubt by the result of an issue; that is sufficient to enable me to annul the fiat.

Sir *John Cross* : — A single instance of trading, coupled with a general intent, is sufficient; but that ge-



1836.

*Ex parte*  
WILKS.In the matter  
of  
TARRANT.

neral intent is not here proved. I suspect the fact to have been, the customer said, "I know you were formerly a milliner; will you do me the favour to make me one dress?" That she did not live by millinery is plain; she also let lodgings.

Sir *George Rose*: — I think the petitioning creditor exercised a sound discretion in refusing the issue, as I do not think he could possibly support this fiat.

Fiat annulled.

C. of R.  
*June 2,*  
1836.

When the amount of a dividend is set apart under 1 & 2 W. 4. c. 56. sect. 31., and invested, and the proof is subsequently allowed, the creditor is not entitled to interest.

*Ex parte* LEWIS.—In the matter of LEWIS.

IN this case the commissioner had rejected the proof, but had set apart the amount of the dividend under 1 & 2 W. 4. c. 56. s. 31. (a)

Mr. *Swanston* and Mr. *Martin* for the petition.Mr. *Bagshawe contra*.

The Court allowed the proof.

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(a) "That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of; and a sum not exceeding any expected dividend or dividends on the debt in dispute shall be set apart in the hands of the said accountant general until such decision be made." 1 & 2 W. 4. c. 56. s. 31.



Mr. *Swanston* and Mr. *Martin* then asked, that as the amount of the dividend had been invested the creditor might be allowed the interest thereon; but —

*Per Curiam* :—Interest is never given in such cases.  
Proof ordered. Interest refused.

1836.

*Ex parte*  
LEWIS.

In the matter  
of  
LEWIS.

In the matter of THOMAS INGS.

THE bankrupt lived in the country. On an application made this morning for a country fiat it was discovered that a docket was already struck for a London fiat by another party.

Mr. *Swanston* now applied *ex parte* for an injunction to stay the issuing of the London fiat till the 13th of June, for which day a regular notice of motion will be made. The same thing was done by the Lord Chancellor in March or April 1834 in *Hicks's* case.

*Per Curiam* :—A fiat cannot be arrested on an *ex parte* motion. All the Court can do is to allow you to issue a country fiat notwithstanding the London docket. If thought expedient, a future application can be made to annul the London fiat.

Sir *George Rose* :—If the description of the bankrupt could be varied ever so slightly from that already given in the docket papers for the London fiat the office would issue another fiat as of course.

Liberty given to issue a country fiat notwithstanding the docket papers for a London fiat. Notice to be forthwith given of this order to the petitioning creditor under the London fiat.

C. of R.  
June 8,  
1836.

Where a docket is struck improperly for a town fiat, a party applying for a country fiat is not entitled to an *ex parte* injunction to stay issuing the town fiat.



C. of R.  
June 8,  
1836.

On a petition to annul, the depositions on the proceedings cannot be read in evidence, though notice to read them has been given, unless copies were tendered.  
*Ut semble.*

*Ex parte* THURKILL. — In the matter of  
DURRANT.

THIS was a petition to annul the fiat for want of the requisites.

Mr. *Swanston*, with whom was Mr. *Rogers*, for the petition.

Mr. *Wilcox* and Mr. *Morley contra* were proceeding to read the depositions on the proceedings in support of the trading and act of bankruptcy, notice to read which had been given, when Mr. *Swanston* objected to these depositions being used as evidence against the alleged bankrupt, having been taken in his absence. By a late decision of the Lords Commissioners in *ex parte Chambers* (a) it is decided that the depositions cannot be read as evidence against the bankrupt on his petition to supersede, being taken behind his back. The depositions were also rejected as evidence in *ex parte Campbell* (b) and *ex parte Coles*. (c)

The CHIEF JUDGE:—*Ex parte Chambers* (a) is decisive of the question: but it appears to me that the reason given, as to being taken behind the back of the party, would not apply when notice to read, accompanied with an offer of copies, is given, because then they become similar to affidavits, and may be contradicted if untrue; and all affidavits are sworn behind the back of the adverse party. As a judge of the Court I may look at the depositions; and if I perceived a deposition thereon clearly proving the trading, I should not annul:

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(a) *Ex parte Chambers, ante, 461.*

(b) *Ex parte Campbell, 2 Rose, 51.*

(c) *Ex parte Coles, Buck, 242.*



still I must give the party seeking to annul an opportunity of meeting such depositions. All affidavits are filed, and copies may be obtained; the depositions are not filed; it is therefore clear that in order to read the depositions on the proceedings as evidence the party must not only give notice of intent to read, but also offer to furnish copies. It would be very desirable to have it finally settled and understood, whether, on notice to the opposite party of intent to read the depositions, and tender of copies thereof, the party supporting the fiat may not then read them as evidence? I think that under such circumstances they ought to be allowed to be read as affidavits; I can perceive no reason why they should not; they are taken before persons competent to take affidavits, and in a judicial matter. Perhaps parties summoned before the commissioners, and compelled to depose, would refuse to make affidavits. (a) In this case there was notice to read, but no tender of copies, therefore they cannot be read. If copies had been tendered I should have admitted them as evidence, that an appeal might be had to the Great Seal, and the practice finally settled.

1836.

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*Ex parte*  
THURKILL.  
In the matter  
of  
DURRANT.

*Sir John Cross:—*

This appears to me to be an attempt to introduce evidence of which the petitioner is totally in the dark: the petitioner is a total stranger to every thing on the proceedings, and is told the fiat is nevertheless to be supported by such proceedings. I think, at any rate, he must have a right to have copies delivered without their being demanded. I am of opinion that the depositions now in question ought not to be read.

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(a) They might be summoned to give *vivâ voce* evidence before the Court of Review.



1836.

*Ex parte*  
THURKILL.  
In the matter  
of  
DURRANT.

Formerly, when one chancellor was judge in bankruptcy, it was bad enough for him privately to read the proceedings; now there are three judges, who might arrive at different conclusions. For myself, I never did and I never intend to read the proceedings privately. As to their being considered as affidavits, let them be filed as such. Why not put the deposition in the shape of an affidavit, and file it? Is it enough to say, I have an affidavit, and you may have a copy, but I will not file it.

Sir George Rose:—

The depositions in *ex parte Chambers* (a) (which were of third persons,—not the depositions on which the adjudication took place,) were rejected, in the exercise, no doubt, of a sound discretion in the particular case; and *Campbell's* (b) case was one of exception: usury occurred. The Court itself may look at the depositions, and it would be idle to say that the mind of the judge is not, in some degree, affected thereby. But if notice to read is given, and copies tendered, so that they become in effect mere affidavits, and the party has an opportunity of answering them, I can perceive no reason why they should not be then read as evidence. On some former occasion the question arose as to who was to be at the expense of filing the depositions on such occasions, and I do not remember how it was settled; but if notice be given of reading them, and copies given, they may, I am of opinion, be read as evidence, and the only question then would be as to who is to pay the expense of filing.

When I look at the proceedings, their effect upon my

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(a) *Ex parte Chambers, ante, 461.*

(b) *Ex parte Campbell, 2 Rose, 51.*



mind is as follows:—if I do not find evidence on the proceedings sufficient to support the fiat, I should give the petitioner the benefit thereof, and annul the fiat; if, on the contrary, the depositions were sufficient to support the fiat, I should then say, “I see much here which requires answering,” and I should put the party in possession of them, and allow him an opportunity of answering them if he could. In this case an offer of copies ought, no doubt, to have been made. I should much regret, however, if any doubt should eventually be found to exist as to the right of reading the depositions as evidence, after notice, and tender of copies.

Depositions not allowed to be read.

Mr. *Wilcox* was proceeding with the case, when

*Per Curiam* :—You do not then ask that the petition may stand over to enable you to tender copies of the depositions, and then insist on your right to read them in evidence?

Mr. *Wilcox* : — I do not, because I have sufficient evidence without them.



*Ex parte* DIACK. — In the matter of DIACK.

THIS was a petition by the bankrupt to restrain an action brought by a creditor. The bankrupt had given two bills; the creditor proved on one, and brought an action on the other; and it did not appear clear whether or not the action was commenced on the bill on which the proof was made.

1836.

*Ex parte*  
THURKILL.  
In the matter  
of  
DUBBANT.

C. of R.  
June 13,  
1836.

If a party proves a debt on a bill, and proceeds at law for the same debt, the Court will issue an injunction to restrain the action.



1836.

Mr. *Koe* and Mr. *Keane* for the petition.*Ex parte*  
DIACK.In the matter  
of  
DIACK.Mr. *Swanston* and Mr. *K. Parker contra*.*Per Curiam* :—

If this proof were on the same bill as that on which the action is commenced, this Court would issue a perpetual injunction to restrain the action (*a*); but the evidence does not render that fact clear. The best course will be, to refer the matter to the commissioner, to clear up the point.

Reference ordered to the commissioners, to state on what bill the proof is made. Petition to stand over, and action stayed in the meantime.

C. of R.  
June 13,  
1836.*Ex parte* KING. — In the matter of WATKINS.

A person collected subscriptions from the members of a club to run greyhounds on account of the treasurer, and became bankrupt: Held, the treasurer might prove for the amount.

THE petitioner, with others at Manchester, formed a club to train and run matches with greyhounds for prizes, &c.; the petitioner was the treasurer, and the bankrupt the secretary, and at his bankruptcy had in his hands 168*l.* subscriptions collected for the club, and 26*l.* for a dinner bill, both of which sums the bankrupt owed the petitioner, whose duty it was to appropriate the money for the purposes of the club: the commissioners rejected the proof as a gambling debt. (*b*) This was a petition for leave to prove.

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(*a*) A proof may be made on *parte Conroy*, 1 *Molloy*, 1. one bill, and an action commenced on another. See *ex parte Sly*, 1 *Gl. & J.* 163; *ex* (*b*) See 16 Car. 2. c. 7., and 9 Anne, c. 14. sect. 5.



Mr. *Sturgeon* for the petition cited *Robinson v. Mearns*. (a)

1836.

Mr. *Temple* and Mr. *K. Parker* contra.

*Ex parte*  
KING.  
In the matter  
of  
WATKINS.

*Per Curiam* :—The bankrupt received various sums of two guineas each, to be paid over to the petitioner; he has not done so, he therefore owes a debt which may be proved: this debt does not arise through gaming.

Proof ordered.

*Ex parte* HALL. — In the matter of HILTON.

C. of R.  
April 18,  
July 12,  
1836.

THE commissioners in the country appointed a meeting for the choice of assignees, but one of the commissioners did not attend, being in London on business. This was an *ex parte* motion, made by the petitioning creditor, that the commissioner should be ordered to appoint another meeting for the choice.

*Quære*, as to the jurisdiction of the Court to order a commissioner to pay costs of a new meeting, necessary by his default in not attending?

Mr. *O. Anderdon* for the motion.

*Per Curiam* :—Take an order that the commissioners be at liberty to appoint another meeting for the choice of assignees. Declare that the costs of and incidental to this application are not at present to come out of the estate; and let the petitioning creditor be at liberty to take out a rule, calling on the commissioner who did not attend to show cause why he should not pay those costs.

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(a) *Robinson v. Mearns*, 6 *Dow. & Ry.* 26.—See *Bate v. Cartwright*, 7 *Price*, 540., and *Lacaussade v. White*, 7 *Ter. Rep.* 535.



1836.

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*Ex parte*  
 HALL.  
 In the matter  
 of  
 HILTON.

July 12.

Sir *George Rose* : — Probably we shall hear no more of the matter; the Court might, if necessary, make some intimation to the Lord Chancellor as to the commissioner.

A motion (a) was now made, that the commissioner in question should pay the costs of the ineffectual meeting, the meeting rendered necessary by his absence, and of the petition, &c.

Mr. O. *Anderdon* for the motion : — This is an application that the commissioner may pay the costs of the meetings, and also of the petition, &c., formerly presented in this matter. On the former occasion, two of the judges intimated that the estate ought not to bear the costs. The commissioner refuses to pay, and this is an application to enforce payment. [Sir *George Rose* : — What jurisdiction has this Court to fix the costs on the commissioner? The commissioners are now appointed in a peculiar manner under the 1 & 2 W. 4. c. 56. s. 14. The CHIEF JUDGE : — Two sets of costs are asked: 1st, Those incurred by non-attendance at former meeting; 2d, Those of the second meeting. What jurisdiction has this Court to order the first costs?] If the Court can order the second costs, it can the first, both arising from the same cause. The Court is not asked to remove the commissioner; but the Court could “recommend” to the Great Seal to remove, as it “recommends” to annul, and the recommendation would be attended to. In *ex parte Kirby* (b) the Lord Chancellor renewed a commission to new com-

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(a) In strictness a petition was necessary, but to save expence the commissioner waived the necessity thereof.

(b) *Ex parte Kirby*, Mont. & Mac. 405.



missioners, for misconduct, and with costs against the old commissioners. This Court, therefore, has jurisdiction in the matters of the costs.

1836.

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*Ex parte*  
HALL.

In the matter  
of  
HILTON.

Mr. *Bacon* for the commissioner:— If the costs only were involved this application would not have been opposed.

Mr. *Bacon* then proceeded to detail the facts alleged to absolve the commissioner from blame, to which it is not necessary to advert.

Mr. *O. Anderdon*, in reply, said, a commissioner was as much an officer of the Court as a master in Chancery was an officer of that Court, though appointed by the Crown.

The CHIEF JUDGE:— The circumstances stated on behalf of the commissioner tend to place his conduct in a more favorable light, still I cannot consider him as wholly exculpated. To have had no excuse for non-attendance would have been worse; but a commissioner has duties as such, and being called away by private business, &c. offers no excuse for non-attendance at the meetings of the fiat when summoned. If a commissioner leaves home he should ascertain whether there are other commissioners who can attend, &c., therefore this commissioner is not quite clear from the charge of neglecting his duty. But the difficulty I feel is as to the jurisdiction of the Court to order payment of the costs of the meeting. The situation of the Chancellor's power over the commissioners was this: he could not exercise direct jurisdiction, but he could nominate or refuse to nominate, and if his intimation was not attended to the party was never nominated again. The juris-



1836.

*Ex parte*  
HALL.In the matter  
of  
HILTON.

diction of this Court is not, over commissioners, to appoint or to remove them, but simply over their decisions,—to review them; and it is only as incidental thereto that this Court can claim any power. If we order this commissioner to pay the costs of the meeting, can we enforce the order by process of contempt? That is a question I wish to consider. If we have not such power, still it will be found that the Court can exercise an indirect power over the commissioner. The commissioner will find it more advisable to pay the costs at once.

*Sir John Cross*:—There are two questions: first, whether default is proved; second, if so, whether the Court has jurisdiction? I should regret that it should be conceived we have not jurisdiction. But I am of opinion, that a case of culpable negligence is not made out.

*Sir George Rose*:—I should regret much if it were conceived that this Court is not sufficiently powerful to vindicate the public against country commissioners, in cases similar to the present. When such accidents as this have occurred the order constantly has been, as this order was, for a new meeting, and the costs reserved, and the costs have invariably been paid at once by the commissioner: this I have known to occur very frequently. In such cases the different commissioners ought to arrange their attendances between themselves. If a commissioner neglects his public duty to attend to private business, assuming it not blameable between man and man, yet when it comes into Court how can it be judicially treated otherwise than as a breach of duty? Who then is to pay the costs; the petitioning creditor or the estate? Now this Court



might adopt a line of proceeding which would be stringent on the commissioner. The fiat might be annulled, and an injunction issued, restraining him from acting under any future fiat; the power to do this exists, though it would be exercised reluctantly. With this intimation, I think the petition may stand over, with liberty to mention it again; but I hope the Court will hear no more of the matter.

1836.

*Ex parte*  
HALL.

In the matter  
of  
HILTON.

Motion ordered to stand over.

*Ex parte* FENWICK. — In the matter of BENDER.

C. of R.  
July 12,  
1836.

A FIAT issued against *Bender* in October 1835. On the 7th of March 1835 he petitioned the Insolvent Debtors' Court, filed his schedule, and was discharged the 25th of April 1835. In this schedule the debts of *Sheppard* and Co. were included as creditors for 900*l.*; the insolvent's debts were 3,932*l.*, and his assets 300*l.* In October 1835 a fiat issued against *Bender*, at the first meeting under which *Sheppard* and Co. proved for 600*l.*, part of the debt of 900*l.*, included in the insolvency schedule. The debts proved under the fiat amounted to 3,938*l.*, and the assets to 1,440*l.*, which assets arose from property obtained since the insolvency, and for which the debts were owing. The petitioner contended that the subsequent creditors ought first to be paid. An application had been made to the commissioners to expunge the debts, or restrain the payment of the dividend; the commissioners took time to consider, and then refused to interfere, and stated that it was a proper case to be submitted to the Court of

A creditor, whose debt is inserted in the debtor's schedule on his passing the Insolvent Debtors' Court, may prove that debt under a subsequent fiat against the debtor.



1836.

—  
*Ex parte*  
 FENWICK.  
 In the matter  
 of  
 BENDER.

Review. This was a petition of a creditor, who was also assignee. It prayed, that *Sheppard* and Co. should be declared not entitled to participate in the assets arising since the insolvent was discharged, till all the subsequent creditors were paid, and that the debt might be expunged or withdrawn from the order of dividend which had been made.

Mr. *Bethell* and Mr. *Wright* for the petition:— In March 1835 *Bender* petitioned the Insolvent Debtors' Court, and in October in the same year a fiat issued against him. He has since acquired property; and the question is, how that is to be appropriated between the old and the new creditors? It is submitted, the new creditors must first be satisfied. The discharge under the insolvency does not discharge the debt; *Jellis v. Mountford* (a); *ex parte Barrington*. (b) [Sir *George Rose*:—This case resembles a trust deed of composition without a release, where a subsequent fiat issues.] In *Barton v. Tattersall* (c), after deciding that equity had jurisdiction to marshal the claims of different sets of creditors, and that the application was not confined to the Insolvent Debtors' Court, it was held that where there had been two insolvencies, and assets arose, the debts since the second insolvency were first to be paid, then the creditors under the second insolvency, and lastly those under the first insolvency. This creditor can resort to the insolvency; the creditors under the bankruptcy cannot. He ought not to prove, without giving the bankruptcy the benefit of his security under the insolvency.

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(a) *Jellis v. Mountford*, 4 Barn. & Adol. 246.

(b) *Ex parte Barrington*, 1 Mont & Ayr. 655, confirmed, *ante*, 245.

(c) *Barton v. Tattersall*, 1 Russ. & Mylne, 237.



Mr. *Swanston* and Mr. *O. Anderdon*, *contra*, were stopped by the Court.

1836.

*Ex parte*  
FENWICK.

In the matter  
of  
BENDER.

The CHIEF JUDGE:—Every argument has been urged in favour of the petition. The act (6 Geo. 4. c. 16. s. 107.) directs the commissioner to divide equally. As to expunging, it is admitted that cannot be done, as is proved by *ex parte Barrington* (a) and the other cited cases. The proof, therefore, is proper. Then are we to consider the sources from whence the property is derived? The insolvent act does not make the discharge a release of the debt; it merely releases the person from arrest and suit by particular creditors. The respondent therefore is entitled to dividends *pari passu*. The instance given by Sir *George Rose* of a trust deed applies with great nicety: this appears a parallel case.

Sir *John Cross*:—The only question is, whether any restraint should be put upon receipt of the dividends, the right to prove being clear? The restraint on the dividend is founded on *Barton v. Tattersall* (b), and the reason given for the decision there, by the Master of the Rolls, seems to decide the present question. The insolvent act does not mention proof, &c. under bankruptcy, which is, therefore, not excluded along with the other remedies barred by that act.

Sir *George Rose* concurred.

Petition dismissed, with costs to be paid by the assignees, with liberty to reimburse themselves out of the estate, provided so doing does not affect the dividends of the respondent or any of the other insolvency creditors.

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(a) *Ex parte Barrington*, 1 *Mont. & Ayr.* 655, confirmed, *ante*, 255.

(b) *Barton v. Tattersall*, 1 *Russ. & Myl.* 237.



C. of R.  
July 18,  
1836.

A clerk compelled to leave the bankrupt's service several months before the bankruptcy, on account of his master's inability to pay his salary, is entitled to six months wages in full.

*Ex parte* SANDERS. — In the matter of GREEN.

THIS was a petition by a clerk of the bankrupt claiming to be paid six months' wages in full. (a)

The assignees did not oppose the claim, but the commissioner disallowed it, on the ground that the petitioner had left the service of the bankrupt six months before the fiat issued. This was a petition against the decision of the commissioner, stating that the petitioner left the bankrupt's service on account of his having assigned all his property in trust for his creditors, thereby putting it out of his power to pay the petitioner.

Mr. *Osborne* for the petition.

Mr. *Whitmarsh* for the assignees.

*Per Curiam*: — As the clerk did not voluntarily quit the bankrupt's service, he ought to be allowed six months' wages in full; but the Court pronounces no opinion on the point whether servants voluntarily quitting the service of their masters do or do not come within section 48.

Six months' wages in full ordered. Costs of both parties out of the estate.

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(a) "That when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last-mentioned amount."—6 Geo. 4. c. 16. s. 48.



*Ex parte* LEVI. — In the matter of LEVI.

C. of R.  
June 13,  
July 19,  
1836.

MR. SWANSTON: — A commission issued in 1828 against *Levi*, he then left England, and went to reside at New York, where he had since continued, and is now in great distress. A true bill has been found against him at Lancaster assizes in 1829 for felony in non-surrendering to the commission. This is a petition by the son-in-law of the bankrupt to supersede the commission, with consent of creditors, on a composition, the amount of which is to be advanced by the petitioner. The only difficulty is that the bankrupt has not surrendered, and the true bill found for felony in not surrendering. But as the commission is taken out for the benefit of the creditors, who are all to receive a composition in the event of the commission being superseded, and not otherwise, it is hoped that in this case *ex parte* Carling (b) will be followed, where a supersedeas was allowed without surrender.

A fiat cannot be annulled, with consent of creditors, where the bankrupt has not surrendered. (a)

Mr. Bacon, for the assignees, consented.

*Per Curiam*: — It is unwise in any case to supersede before surrender. Here the bankrupt did not leave the country before the commission issued, this may be presumed because a true bill for felony for non-surrender has been found: to supersede would enable him to defeat justice, and compromise a felony, which this Court cannot sanction.

Order refused.

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(a) See a note on this subject in *Montagu and Bligh's Reports*, Appendix.

(b) *Ex parte* Carling, 2 Gl. & J. 35.



1836.

*Ex parte*  
LEVI.In the matter  
of  
LEVI.July 19,  
1836.

Where a true  
bill for felony in  
non-surrender-  
ing has been  
found against a  
bankrupt, the  
Court will not  
order a meeting  
to be held for  
his surrender.

The bankrupt's son-in-law now presented a petition, praying that the commissioners might be at liberty to call a meeting to take the bankrupt's surrender.

Mr. *Swanston* for the petition.

Mr. *Bacon*, for the assignees, consented, and supported the application.

The CHIEF JUDGE: — The Lord Chancellor only ordered a meeting to take the surrender where he thought the case not fit for a criminal prosecution. In this case a grand jury has found a true bill against the bankrupt; and if we accede to the present application a petition to annul under 6 Geo. 4. c. 16. s. 133. and 134. will follow as of course, by which the criminal prosecution will be got rid of. The only circumstance stated to induce the Court to grant the application is the allegation that a relation of the bankrupt has offered to pay the creditors a composition for their consent to the supersedeas. It is therefore asking the Court to become a party to a compromise of a felony. The Court ought not to take the first step when it cannot accede to the second.

Application refused.

LORDS  
COMMISSIONERS.July 4,  
1836.

In the matter of MABERLY.

MR. MONTAGU moved, on the authority of *ex parte Keys (a)*, that an appeal in this case from the decision of the Court of Review might be heard on petition instead

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(a) *Ex parte Keys*, 1 Mont. & Ayr. 226.



of special case (*a*), the questions of law and fact being so involved as to create a practical bar to a special case.

1836.

In the matter  
of  
MABERLY.

Lord Commissioner *Pepys*: — The 1 & 2 W. 4. c. 56. was passed in order to relieve the Court of Chancery from the burden of bankruptcy business, and to protect the suitors in equity from having their causes postponed by the interruption of long bankrupt petitions on questions commonly depending on facts which required much time to investigate. For the same purpose appeals from the Court of Review are confined to questions of law, equity, or rejection or admission of evidence. This Court, indeed, can hear an appeal “otherwise” than on special case; but it is not alone enough to induce this Court so to do that the matters of law and fact are blended, and that the facts are numerous.

Motion refused.

*Ex parte* BRITTEN.—In the matter of BRITTEN.

LORDS  
COMMISSIONERS.  
*August*  
1836.

MR. AYRTON moved that an appeal from the Court of Review might be heard on petition instead of special case, on the ground that the question in dispute, viz. whether the bankrupt ought to be restrained from disputing his commission at law, was a question of law which depended on and was intimately connected with facts, concerning which numerous affidavits had been filed,

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(*a*) “In cases of appeal to the mode whatsoever, except the Lord Chancellor by virtue of Lord Chancellor shall in any case this act such appeal shall be on otherwise direct.”—1 & 2 W. 4. special case, and in no other c. 56. s. 3.



1836.

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*Ex parte*  
 BRITTEN.  
 In the matter  
 of  
 BRITTEN.

and which were so contradictory and of such a nature as to render it impracticable to draw up a special case.

Lord Commissioner *Pepys* : — That the facts are disputed and the affidavits voluminous, and the facts and law blended, is not a reason for dispensing with the act of parliament. If the party has any other ground for what he asks he may apply again.

Motion refused.

LORDS  
 COMMIS-  
 SIONERS.

In the matter of BUTTERWORTH

MR. *BETHELL* moved that an appeal from the Court of Review in *ex parte Wilson* (a) might be heard on petition instead of special case, as the question of law, a very important one, depended on facts the affidavits touching which were conflicting and very voluminous. But —

*Per Curiam* : — A similar application has already been rejected. The reasons which there induced the Court to refuse what was asked apply with equal force to the present application.

Motion refused.

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(a) *Ex parte Wilson*, 2 Mont. & Ayr. 61.



*Ex parte* COOPER. — In the matter of COOPER. (a)

C. of R.  
July 19,  
1836.

**T**HIS was a petition by the bankrupt for his percentage or allowance of 500*l.* under 6 Geo. 4. c. 16. s. 128. (b) The fiat issued against him in June 1833; a first dividend was declared in December 1834, and a second in 1835, which was advertised under 6 Geo. 4. c. 16. s. 109. (c). The two dividends amounted to 12*s.* 6*d.*

After a final dividend meeting under 6 Geo. 4. c. 16. s. 109. the bankrupt is entitled to his per-centage or allowance; and that he owes money to the assignees, or they claim a debt from him, makes no difference.

(a) *Ex relatione.*

(b) "That every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees, provided such allowance shall not exceed four hundred pounds; and every such bankrupt, if such produce shall pay such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per cent., provided such allowance shall not exceed five hundred pounds; and every such bankrupt, if such produce shall pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid as aforesaid ten pounds per cent., provided such allowance shall not exceed six hundred pounds; but if such produce shall not pay such creditors ten shillings in the pound,

such bankrupt shall only be allowed and paid so much as the assignees and commissioners shall think fit, not exceeding three pounds per cent. and three hundred pounds."— 6 Geo. 4. c. 16. s. 128.

(c) "That if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall, within eighteen calendar months after the issuing of the commission, appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days' notice in the London Gazette), to make a second dividend of the bankrupt's estate, when all creditors who have not proved their debts may prove the same; and the commissioners at such meeting, after taking such audit as herein-before directed, shall order the balance in the hands of the assignees to be forthwith divided amongst such of the creditors as shall have proved their debts; and such second dividend



1836.

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*Ex parte*  
 COOPER.  
 In the matter  
 of  
 COOPER.

in the pound. The bankrupt had obtained his certificate. He was a hotel keeper, and had been employed by the assignees on behalf of the estate to carry on the business of the hotel for the benefit of the estate, and while so doing became indebted to the assignees in 383*l*.; but he claimed a debt of 2,000*l*. against the estate, which was disputed by the assignees, who stated that these claims prevented winding up the estate.

Mr. *Twiss* and Mr. *Hindes*, for the bankrupt, contended that the dividend was advertised, and considered final; and that being so advertised under section 109. it was final within the meaning of the decisions, to entitle the bankrupt to his allowance, even though some of the estate should be outstanding, which is not admitted in this case. *Ex parte Sikes (a)*, where the allowance was refused, only nine months had elapsed from issuing the fiat, and new creditors might have come in.

Mr. *Swanston* and Mr. *Bacon*, *contra*: — This cannot be a final dividend, as the 383*l*. owing from the bankrupt is outstanding; and the commissioner has not declared that this is a final dividend, as is clear from inspecting the proceedings; and in *ex parte Surridge (b)*,

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shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out, not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money,

and within two calendar months after the same shall be so converted divide the same in manner aforesaid."—6 Geo. 4. c. 16. s. 109.

(a) *Ex parte Sikes*, 1 *Atk.* 208.

(b) *Ex parte Surridge*, *Mont. & Mac.* 287; and see *ex parte Minchin*, *Mont. & Mac.* 135.



correcting *ex parte Davis* (a), it was decided that no allowance was payable till after final dividend.

1836.

*Ex parte*  
COOPER.

In the matter  
of  
COOPER.

*Per Curiam* : — This is a question under 6 Geo. 4. c. 16. s. 128. The bankrupt has obtained his certificate (b), and a dividend of 12s. 6d. in the pound has been paid. The 128th clause is general, but it has been decided that if the second dividend declared under section 109. be not final, that the bankrupt shall not be entitled to his allowance under section 128. It has also been decided that a dividend is not final unless declared by the commissioners, and advertised in such a manner as to make it apparent that a final dividend is actually intended. The reason no allowance or percentage is paid till after final dividend is, because till then it is unknown what the dividend will be, and there may be creditors who may not come in till the final dividend meeting. The question now is, whether the second dividend, as declared in this case, was declared as a final dividend within the decisions to entitle the bankrupt to his allowance or per-centage? It is not necessary that the word “final” should be used, if it appear from the state of the proceedings, and the mode in which the declaration of dividend is made, that it was intended to be final. It appears to the Court that such is the fact here, and that the dividend is sufficiently final to entitle the bankrupt to his allowance, though it may not be final for the purpose of preventing subsequently accruing property from being

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(c) *Ex parte Davis*, Mont. & Mac. 36. But *ex parte Surridge* is doubted in *ex parte Gibbs*, Mont. 105, where the allowance was made, though there had been no final dividend; and see the argument in *ex parte Gibbs*. (b) *Ex parte Pavey*, 3 Gl. & J. 68, 358.



1836.

*Ex parte*  
COOPER.In the matter  
of  
COOPER.

distributed, no dividend being final in that sense. It does not appear to the Court that the claim of the assignees against the bankrupt for 368*l.*, said to be outstanding in his hands, prevents his claiming his allowance; the assignees may set off that. The bankrupt having a claim against the assignees for 2,000*l.* cannot affect this question.

If the bankrupt owes money to the assignees, the Court will order it to be set off against his allowance.

Declare the dividend final, for the purpose of entitling the bankrupt to his allowance; and declare the bankrupt entitled to an allowance of 500*l.*, subject to an inquiry relative to 368*l.*, alleged to be due from him to the assignees. If so due, order the difference only to be paid the bankrupt at present, and the balance abide the result of the inquiry. Reserve further directions and costs.

C. of R.  
July 19,  
1835.

If A. agrees to procure from C. a lease for B., this is within 6 Geo. 4. c. 16. sect. 75 or 76. [See other points in the margins *postea*.]

*Ex parte* BENECKE. — In the matter of PEARSON.

THE petitioner and the bankrupt were both manufacturing chemists. The petitioner was in possession of a manufactory and premises at Deptford, and by an agreement between the petitioner and the bankrupt, dated July 30, 1833, the petitioner covenanted with the bankrupt that he (petitioner) would, on or before September 1833, procure *Edmonds*, the ground landlord, to grant the bankrupt a lease of the premises for eighteen years from December 1832, and that he would deliver up possession of the stock and premises in August 1833; and the bankrupt covenanted that he would accept the lease without inquiring into the lessor's title, would take possession in August 1833, and would execute a bond



for 3,200*l.*, by instalments of 1,100*l.*, 1,100*l.*, and 1,000*l.*, and another for 6,000*l.*, payable five years from the 1st of August 1833; and that, for securing payment of the bonds, he would execute a mortgage to the petitioner of the premises; and each party bound himself to the performance of this agreement in a penalty of 2,000*l.* as liquidated damages. These bonds were accordingly given, and the bankrupt took possession of the manufactory at Deptford, and the lease was preparing, when *Edmonds*, the landlord, died, leaving infant children, and the property being gavelkind created difficulties about the lease, which retarded it some time, and the bankrupt falling into pecuniary embarrassments took no steps to procure the execution of the lease. The first instalment for 1,000*l.* became due, but was not paid, whereon the petitioner brought an action in the exchequer, and obtained a verdict, and damages were assessed the 16th of June 1835. The bankrupt filed a bill in Chancery against the petitioner, to have the agreement set aside, on the ground that the petitioner was unable to procure the lease, as he had agreed to do, owing to the death of Mr. *Edmonds*, and the property being gavelkind, and his heirs being infants, and because the only lease which could be granted was one with restrictive covenants, and that such a lease was not within the meaning of the agreement. The bill contained an offer to pay the petitioner what should be found due for ground rent and for occupation rent; and it prayed to have the agreement cancelled, and for an injunction to stay the action at law in the meantime. The injunction was moved for before the Vice Chancellor, and refused.

On the 19th of June 1835 a fiat issued against *Pearson*, on an act of bankruptcy committed on the 18th of June 1835.

1836.

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*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.



1836:

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*Ex parte*  
 BENECKE.  
 In the matter  
 of  
 PEARSON.

July 30,  
 1835.

The petitioner presented a petition under 6 Geo. 4. c. 16. s. 75. (a), praying that the assignees might elect, and that if they rejected the agreement they might be ordered to deliver up possession.

Mr. *Hull* for the petition.

Mr. *Swanston* and Mr. *Sidebottom* for the assignees:—  
 This is not a case within section 75, as the petitioner is not a “lessor” within the act; he only undertakes to procure a lease from another. Another objection is, the petitioner is unable to procure any lease, except one with a covenant against alienation.

*Per Curiam*:—If the petitioner has agreed to do that which he cannot do, and the assignees elect to abide by the agreement, then, as the petitioner submits to the jurisdiction of this Court by his present petition, we shall find no difficulty in giving the assignees the fullest

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(a)“ That any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or nonperformance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit.”—  
 6 Geo. 4. c. 16. s. 75.



relief. The objection to the jurisdiction is not good. This is an "agreement for a lease," by whoever made; besides which, section 76 (a) comes in to assist our jurisdiction. If it be clear that an agreement is one which equity would not enforce, this Court would not make any order under section 75 or 76. If the assignees elect to take, and the petitioner cannot perform his agreement, the costs of this petition would fall on him.

1836.

—  
*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

After much discussion, the following order was made in Court, being understood to be a sort of compromise:—The assignees declining the agreement, let them deliver up possession of the premises; let the agreement be cancelled; and let the petitioner deliver up the bonds within a week.

Mr. *Hull* now moved to vary the minutes of the order in this matter, by adding the words "without prejudice to any proof or remedy the petitioner may have under the fiat or otherwise." He stated that the petitioner had been before Mr. Commissioner *Fane*, and tendered proof on the bonds, and for the 2,000*l.* penalty, which was not allowed on account of the words of the order.

Nov. 4,  
1835.

Mr. *Swanston* and Mr. *Sidebottom*, *contra*:—The proposed alteration ought not to be made. If the Court

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(a) "That if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor or person claiming under him, or may make such other order therein as he shall think fit."—6 Geo. 4. c. 16. s. 76.



1836.

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*Ex parte*  
 BENECKE.  
 In the matter  
 of  
 PEARSON.

intended to exclude proof, of course the minutes cannot be varied. If the Court did not so intend, and the commissioner rejects the proof improperly, the parties may appeal.

The CHIEF JUDGE: — The Court did not intend, nor does the act enable the Court, to affect the proof. The addition of the words proposed is only carrying the intent of the Court into effect. My note of the order has the words “deliver up,” not “cancel;” but the registrar’s note is “cancel.”

Sir *John Cross*: — I was not aware that the word “cancel” or “annul” formed part of the order of the Court. We have power to make “such other order as may be just;” but that is between the parties before the Court; that is, the creditor or landlord and the assignees. But the bankrupt was not before the Court; and if we order the agreement “to be cancelled,” what remedy will the bankrupt have in case his fiat is annulled?

Sir *George Rose*: — The word “cancel” I apprehend would only affect the assignees, and would not hurt the bankrupt, who was no party to the order.

Order varied by omitting the words “cancelled or annulled,” and adding “without prejudice to any proof or remedy of the petitioner under the said fiat or otherwise.”

The order therefore stood thus: — The assignees declining the agreement, let them deliver up possession of the premises; let the petitioner deliver up the bonds and agreement within a week, without prejudice to any proof or remedy of the petitioner under the fiat or otherwise.



The petitioner then went before the commissioner, and claimed to prove; 1st, for 2,000*l.* as the penalty for breach of the agreement; 2d, 2,000*l.* for rent for use and occupation of the premises in question; 3d, 1,682*l.* for damages and costs under the action in the Exchequer; 4th, 2,095*l.* for dilapidations; and, 5th, 400*l.* for ground rent. The commissioner rejected these proofs: the 1st, because there was no debt on which an action could be maintained; the 2d, because it was for damages under the agreement which was annulled; the 3d, as being for damages not liquidated at the bankruptcy; and the 4th was rejected unless the 3d claim was waived. This was a petition for leave to prove these different sums.

1836.

—  
*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

Mr. *Temple* and Mr. *Hall* for the petition.

July 19,  
1836.

Mr. *Swanston*, Mr. *Sidebottom*, and Mr. *Stinton* for the assignees: —

First. The Court has no jurisdiction to make the order prayed; the Court never had jurisdiction to make the former order. The 6 Geo. 4. c. 16. s. 75. only applies between lessor and lessee; it was decided in *Young v. Taylor* (a) that it did not extend to the case of lessor and assignee of lessee.

At present, independently of the bonds, the Court cannot order any proof to be made. The proofs tendered were such as the commissioner was bound to reject, according to well established law; and this Court cannot order a proof to be made which the commissioner is bound to reject. So far as a debt being proveable is concerned, this Court has no higher or other jurisdiction than the commissioner. [Sir *John Cross*:—

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(a) *Young v. Taylor*, 2 *Moore*, 340. See *ex parte Warwick, Buck*, 326.



.1836.

*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

A debt on an equitable mortgage is such as the commissioner does not allow to be proved, if the party retains his security; this Court allows it, orders a sale, and directs a proof for the residue.] The latter part of such order is unnecessary. If the mortgagee think fit to realize his security by the aid of another Court, (instead of coming here, which is more convenient,) he would have a strict legal right to prove for the residue, without any order of this Court.

In this case, if the Court has any other jurisdiction than the commissioner, it must be under section 76, which was passed, not to enable proofs to be made, but to relieve the bankrupt. [The CHIEF JUDGE:—And also to assist the intended vendor, who otherwise might be unable to recover his property from an irresponsible person.] Sections 75 and 76 are confined to agreements, and do not authorize the Court to do what in effect is allowing a compensation out of the bankrupt's estate. [Sir John Cross:—If you had money instead of your bonds, could not the Court, on ordering the agreement to be delivered up, order you to refund part of the money, if just so to order?] Not unless the landlord comes for an order under clause 75. [The CHIEF JUDGE:—It is not imperative on the Court to annul the agreement entirely, on ordering possession to be given up.]

Then the existence of the bonds can give the Court no jurisdiction. The bonds cannot be enforced when the property for payment of which they were the consideration is taken back by the vendor. If the debt on the bonds is not proveable according to the rules of law and bankruptcy, then the Court cannot, in return for preventing such proof, enable a party to prove a debt not properly proveable.

If the Court had jurisdiction, it has exhausted it by



the order already pronounced: the words of clause 75 are "or make such other order;" the Court has made "such other order," and can do no more.

Second. If the Court has jurisdiction, it cannot be exercised as asked. It appears from the affidavits that the petitioner could not complete his contract, and therefore the bankrupt is the party entitled to compensation for its nonperformance, the losses which both parties have incurred having arisen from that fault of the petitioner in having hastily undertaken to obtain a lease which he had not the means of procuring to be granted.

Mr. *Temple* in reply:—

First. As to jurisdiction. The Court, having nullified the bonds by which the petitioner could have enforced a demand for 9,000*l.*, surely can permit him to prove any sum short of that; the claim for dilapidations is stronger than that for an occupation rent. Surely when the property is delivered back to the petitioner, he is entitled to have it restored in its original good condition. If the bankrupt had set aside the agreement in equity, he must have restored the property *in statu quo*, even if he was not entitled to occupation rent. By the form of the order the Court expressly avoids the objection of having exceeded its jurisdiction.

Second. As to the facts. The affidavits do not attempt to impute the non-completion of the contracts to the restrictive covenants; they rely on the infancy of the parties as an objection to granting the lease, an objection which is not valid.

The CHIEF JUDGE:—

Assuming, as we are entitled to do, that the petitioner was in a condition to make out the title which he cove-

1836.

*Ex parte*  
BENECKE.

In the matter  
of  
PEARSON.



1836.

—  
*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

nanted with the bankrupt to do; assuming that the premises have been restored to him in a deteriorated condition, and assuming the petitioner to have been kept out of possession of the premises by the occupation of the bankrupt under the agreement down to the bankruptcy; and assuming that the only reason why the petitioner has not performed his part of the agreement is the insolvency of the bankrupt; then justice requires that the petitioner should be placed in as good a situation as that in which he would have been if the bankrupt had voluntarily abandoned the agreement, and the petitioner had acquiesced therein.

It may, indeed, be impossible to replace the petitioner in as good a situation as he was in before the contract, or for him to recover the connexions and business which he then enjoyed. So far, however, as a court of justice can replace and indemnify him, so far this Court is disposed to go. The judgment of the Court will not proceed on the ground that the commissioner has acted erroneously in rejecting these proofs, which were tendered on the bonds which depended on the agreement, and when that was annulled the bonds fell with it. The proof tendered for occupation rent was properly rejected, because that could have been claimed before the commissioner upon such an implied agreement only as placed the petitioner and bankrupt in the situation of landlord and tenant; but the presumption of the existence of any such implied agreement was excluded by the existing written contract. The sum sought to be proved for dilapidations was, as it came before the commissioner, a claim for damages not liquidated at the bankruptcy, and he properly exercised jurisdiction in rejecting such proof. The claim for ground rent could not be sustained before the commissioner when tendered. This Court, therefore, does not impeach the



decision of the commissioner in rejecting these proofs, but considers it has by its own order prevented the petitioner establishing any proof before the commissioner, and that it ought to take care that no injustice arises from the form of that order. The Court must now decide as if it were hearing the first petition presented, calling on the assignees to elect. What then was the state of things when that petition came on to be heard? The assignees were in possession of the premises, which, according to their own statement, it would have been a loss to them to retain: on the other hand, the petitioner then had a right under the terms of the contract to have proved for 9,000*l.* upon the bonds. It would be most unjust to put an end to the agreement, and at the same time deprive the petitioner of his right to prove on the bonds, and merely give him back the premises, with the loss of intermediate profits. It has been contended, however, that whatever may be the justice of the case, the Court has only jurisdiction to order the assignees to elect as to the lease, and to order them to deliver it up if they reject it. Now the statute expressly authorizes the Court to make such other order therein as it shall think fit; and there can be no doubt that the legislature intended that such an order might be made as would do complete justice between the parties according to the rules of bankruptcy. Before any order was pronounced in this case, the petitioner was clearly entitled to prove on the bonds; then the Court interposes, and orders the bonds to be delivered up, without prejudice to any question of proof. It appears to me to be within the scope of that order to confer on the petitioner, in lieu of that proof of which it so deprives him, such right of proof as justice requires. To whatever extent a court of equity would go in putting an end to an agreement, to that extent the statute gives

1836.

*Ex parte*  
BENECKE.

In the matter  
of  
PEARSON.



1836.

—  
*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

this Court power to go in ordering a proof. In the bill in equity to set aside the agreement the bankrupt admitted by his offer that he was bound, in equity, to make good the loss of the petitioner, so far as that arose from the bankrupt's occupation. It is also equitable that the premises should be delivered up in as good a condition as they were in when the bankrupt entered into possession: what that condition was must be matter of inquiry, as the bankrupt may have made great improvements. There must, therefore, be an inquiry as to what will be a reasonable compensation for the occupation and deterioration of the premises, and the petitioner must be allowed to prove the amount of ground rent he has paid while out of possession. I am anxious that in exercising all the powers given the Court by the legislature, the petitioner may, as near as possible, be placed in as good a situation as he was in when the agreement was executed.

*Sir John Cross* :—If the petitioner had tendered proof upon his bonds before he applied to this Court nothing could have defeated his claim, for the only ground on which it could have been met would have been that the agreement failed from the default of the petitioner. I think the agreement did not so fail; but, however that may be, no injury had accrued to the estate of the bankrupt up to the time of the bankruptcy from any difficulty in completing the agreement, whichever party was the cause of such difficulty. The bankrupt enjoyed the use of the premises as fully and beneficially as he could under any circumstances: it is the bankruptcy which has put an end to the contract. It appears that the bankrupt was very willing that the contract should not be performed, as he was not to pay the money secured by his bonds till the title was completed; and he



determined to delay that as long as he possibly could, and keep possession without paying. The order made by this Court did not, as has been alleged, expend its jurisdiction: it was made "without prejudice to any proof," and the question now is the amount of such proof, that is, how far can the respondents cut down the sum for which the bankrupt was originally entitled to prove? The petitioner is willing to give up his securities on being admitted to prove for so much as will indemnify him in respect of occupation rent, ground rent, and dilapidations; and it appears to me that the Court has jurisdiction to allow the proof on these particulars.

1836.

*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

*Sir George Rose :—*

Upon the best consideration I can give this case, I think the petitioner entitled to prove for dilapidations. We now consider the question as if it came before us on the petition for the assignees to elect: at that time the petitioner was in a condition to prove upon his bonds; but, then, he must have recognized the agreement, and have been content to abide by it. Now, these bonds on which the petitioner had a legal right to prove give the Court jurisdiction to work out the justice of the case.

Independently of what can be accomplished by regular proof, this Court has always had an equitable discretion to direct a party to be admitted a creditor under a bankruptcy; and cases continually occur in which, although a commissioner may have been justified and correct in rejecting a proof, yet the Court has made an order allowing such proof to be admitted. There are two ways of looking at this question:—Is this Court bound by the act, in dealing between a stranger and the



1836.

—  
*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

estate, to act as a commissioner could only? or, Can the Court act as a court of equity would under the circumstances? It appears to me the Court ought not merely to administer legal, but also equitable rights. This is no vague or undefined jurisdiction; it is guided by the same principles which govern courts of equity; and this Court considers what was the situation of the parties when the act of bankruptcy took place and the fiat issued. A bill was filed in equity to set aside the contract in question, in which he tendered compensation (which he was obliged to do) for use and occupation, including, collaterally, dilapidations. Bankruptcy having called for the interference of this Court, it ought to act upon the same principles as those on which the Court of Chancery would have acted if the suit had proceeded. The question then is, what would equity have done? The petitioner has no legal claim for use and occupation, because the express agreement between the parties negatives any implied one; therefore the commissioner cannot admit the proof. But it is every day's practice for this Court to interfere to direct a proof to be received, which a commissioner, in the exercise of his jurisdiction, has properly rejected. This Court certainly has a power to direct the proof of a creditor to be received upon equitable terms, and in this case ought to direct a proof for occupation, ground rent, and dilapidations. Mr. *Swanston* has said that he sincerely entertains doubts of this Court having such jurisdiction,—doubts which are entitled to respect: but even if the view I take is not sound, other grounds are not wanting on which the order of this Court might be sustained within the more ordinary jurisdiction of this Court. No doubt the difficulty mentioned by Mr. *Swanston* exists as to the proof being, in fact, for unliquidated



damages; but that has often been got rid of or passed over. In *Utterson v. Vernon* (a) it was decided that where a creditor has a demand which in ordinary cases would be considered damages, but is capable of valuation without the intervention of a jury, the debt is proveable. I think, therefore, upon both grounds the order must stand as pronounced; but no costs can be given in such a case as the present.

1836.

Ex parte  
BENECKE.  
In the matter  
of  
PEARSON.

In drawing up the minutes of the order Mr. *Swanston* contended that the officer in taking an account of dilapidation ought to set off against them the improvements made by the bankrupt.

Mr. *Temple* assented, if such improvements were described in the order as "lasting improvements," and contended that the order as proposed would lead to interminable disputes and expences; and suggested that the formal words of a decree in equity on a mortgage should be used, these having a definite and recognized signification.

The COURT did not accede to this, on which—

Mr. *Temple* wished to abandon the claim and inquiry as to dilapidations.

Mr. *Swanston* objected to the order being taken otherwise than as already pronounced.

Mr. *Temple* objected to the petitioner's relief being affected by a claim of the respondents which they had not put forward during the argument, and on which the counsel for the petitioner had not been heard.

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(a) *Utterson v. Vernon*, 3 Ter. Rep. 539.



1836.

*Ex parte*  
BENECKE.  
In the matter  
of  
PEARSON.

The COURT, however, decided that the petitioner must take or reject the whole order.

The order made was: — Declare the petitioner entitled to an occupation rent up to the bankruptcy. Reference to the registrar as to what was due for occupation. The like declaration and inquiry as to ground rent. Inquiry as to dilapidations, and whether the value of the premises was increased when delivered up. Liberty to state special circumstances. Reserve further directions.

C. of R.  
July 20,  
1836.

The solicitor cannot, in bankruptcy, compel the assignees to pay his bill if they have no assets.

*Ex parte* ADAMS. — In the matter of FRIEDMAN.

THIS was a petition by the solicitor (who appeared in person) for payment of the balance of his bill of costs by the assignees. The bill was for an action commenced by the assignees.

*Mr. Swanston contra.*

*Per Curiam* : — The affidavit in support of the petition does not state that the assignees have assets wherewith to pay the bill. If the petitioner brings an action against the assignees want of assets under the bankruptcy will not be an answer; in this Court that is a defence. (a) The petitioner may take an order for payment of his bill whenever the assignees have assets, or may have an inquiry as to whether in fact they now have assets.

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(a) See *contra*, *ex parte* Coates, 1 *Mont. & Ayr.* 328, and the cases there cited.



*Ex parte* POWNALL.—In the matter of POWNALL.

C. of R.  
July 20,  
1836.

**P**OWNALL was surety for the payment of a sum secured by bond to Messrs. *Alexander* and Co., and becoming bankrupt, the amount was proved against his estate by *Alexander* and Co.; since which they had received sums on account of the debt from other sources. This was a petition by the bankrupt, praying that the proof might be reduced by the amount of the sums so received.

A proof reduced.  
on the petition  
of the bankrupt,  
but by consent.

Mr. *Swanston* for the petition.

Mr. *Bethell* for *Alexander* and Co. consented to the reduction.

Mr. *J. Russell* consented for the assignees.

Mr. *Watson* consented for the two sureties.

*Per Curiam* : — This debt can only be reduced by consent, and with an affidavit that there is no collusion; the prayer being contrary to the law and practice in bankruptcy, as the bankrupt makes the application instead of the assignees.

Proof reduced by consent, the petitioner paying the costs of all parties served.

*Ex parte* BRAND and others. — In the matter of  
SMITH.

C. of R.  
Nov. 20, 23,  
and 24.  
1835.  
July 20.  
1836.

**T**HIS was a petition by the assignees, praying that several persons who had proved fictitious debts, which had been expunged, might pay the costs and losses of



1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

Where A. combines with B., also A. with C. and A. with D., to prove fictitious debts, in pursuance of a fraudulent plan, a petition will not lie praying that A., B., C., and D. may pay the gross amount of costs incurred by the estate, and consequential to such fraudulent plan.

Such debts being subsequently expunged, the Court cannot order the fictitious bills on which the proof was made to be delivered up, unless they were delivered by the bankrupt after his bankruptcy.

See other points in the margins, post.

and incidental thereto, which had fallen on the estate, and deliver up the fictitious bills on which these proofs had been made.

In November 1831 a fiat issued against *Duncan Neil Smith* on the petition of *Vaughan*, his father-in-law, on *Smith's* note for 500*l.* It subsequently appeared that this debt was fictitious, and the bill made after *Smith* stopped payment; and a new petitioning creditor's debt was eventually substituted.

*Vaughan* had in his possession numerous bills of exchange accepted by the bankrupt without consideration, in order to enable *Vaughan* to deliver these bills to various parties, that they might put fictitious proofs on the proceedings, and thus carry the choice of assignees against *bonâ fide* creditors. The petition alleged that these bills were delivered by the bankrupt to *Vaughan* after the bankruptcy, but the Court was of opinion that the fact was not proved.

Among the fictitious proofs thus made were the following; — *Beeston* for 255*l.*, *Philpott* for 810*l.*, *Angle* for 509*l.*, and *Baldwin* for 229*l.*; and he delivered the dividend thereon to *Vaughan*. Various other fictitious debts were also proved under similar circumstances, and the amount of the whole of these fraudulent proofs was 3,252*l.*; and they were all subsequently expunged. But the parties who made these proofs had previously elected *Baldwin* and *Williams* assignees; and the petition alleged that this was done in concert and collusion with each other. *Vaughan* afterwards proved two fictitious debts of 4,630*l.* and 300*l.*, which were afterwards expunged. *Williams* subsequently absconded with 348*l.*, part of the monies of the estate, in his hands, and *Baldwin* had not accounted for a sum of 112*l.* received under the fiat and lent to *Vaughan*. When *Williams* absconded an order was obtained for a new choice of assignees, when



*Vaughan, Philpott, and Angle* attended, and chose *Angle* assignee.

In March 1832 a dividend of 2s. 4d. in the pound was paid on all the above fraudulent proofs, together with the real debts proved by the real creditors.

In January 1834 a person of the name of *Welchman* made disclosures which led to examinations into the validity of the above-mentioned fraudulent proofs. The matter was adjourned to the Subdivision Court, when it appeared that *Welchman* accepted two bills for the bankrupt, one of which was delivered to *Baldwin*, who proved on it: the debt was expunged. *Baldwin* thereon appealed to the Court of Review, and two of the creditors presented a cross petition to remove *Baldwin* from being assignee. The Court of Review confirmed the decision of the Subdivision Court, and ordered *Baldwin* to be removed. In July 1834 *Brand* and *Lawrence*, the present petitioners, were chosen assignees, and *Angle*, in consequence of what fell from the Court, presented a petition for his own removal, which was ordered in November 1834. The Court of Review ordered *Vaughan* to refund the dividends received under his fraudulent proofs, but he became bankrupt without having so done.

*Baldwin* indicted *Welchman* for perjury relative to his evidence touching the fraudulent proofs, but unsuccessfully; and *Welchman* being a poor man, the assignees paid the expences of his defence, conceiving it identified with the interests of the estate.

The petition now before the Court alleged that shortly after the time of issuing the commission a concerted plan was formed by *Beeston, Vaughan, and Baldwin* to defraud the creditors of the bankrupt, and that *Angle* concurred and aided therein; and that the acts herein-

1836.

—  
*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.



1836.

—  
*Ex parte*  
 BRAND  
 and others.  
 In the matter  
 of  
 SMITH.

before mentioned were done by the several persons in pursuance of the same concerted plan; and that great loss and damage had been sustained by the creditors by reason of such fraudulent concert and contrivance, and the acts done in pursuance thereof. That owing to the fraudulent proofs and choice of assignees the estate had sustained the loss of the 348*l.* with which *Williams* had absconded, and of the expences of removing him from being assignee, and that the whole amount of such costs “had been taxed” (a) at 668*l.*; and that the dividend on one of the fraudulent proofs, made by one *Davies*, had not been refunded, he being dead.

The petition prayed that *Baldwin*, *Angle*, *Vaughan*, *Beeston*, and *Philpott* might respectively be ordered to deliver up to the official assignee the bills and notes on which the fraudulent proofs were made, that they might pay 348*l.* with which *Williams* had absconded, with interest; also the 668*l.* costs occasioned to the estate by the fraudulent proofs, and also the dividends received by *Vaughan* and *Davies*.

*Vaughan* and *Davies* did not appear.

It was attempted to be proved by evidence that *Vaughan*, *Baldwin*, *Beeston*, *Philpott*, *Angle*, and the others making fictitious proofs colluded *inter se*, but the Court was of opinion that such was not proved to be the fact, and that the evidence went no further than to establish that *Vaughan* and *Beeston* had combined, and *Vaughan* and *Philpott*, and *Vaughan* and *Angle*, &c.

Mr. *J. Russell*, Mr. *Bethell*, and Mr. *O. Anderdon*.

*Baldwin* is answerable for the loss to the estate incurred through the misconduct of *Williams*, because

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(a) See what Sir *G. Rose* says as to this taxation, *postea* page 720.



*Baldwin* knew that the commission was fraudulently working, and was privy to *Williams* retaining the 348*l*. In *Wood v. Wood* (a) a receiver was appointed and died; whereupon the solicitor to the cause assumed to act as receiver, and sometimes he received the rents, while at others he neglected so to do, whereby some of the rents were lost, and Lord *Eldon* considered the solicitor responsible for the lost rents. The costs of the proceedings mentioned in the petition may be ordered to be paid, it being a principle in bankruptcy that costs may be given against all persons, whether strangers to the commission or not, who are guilty of any fraud. [Sir *George Rose*:—That rule is confined to costs properly so called.] It was decided in *ex parte Boyle* (b) that the jurisdiction in bankruptcy extends over every person concerned in issuing a fraudulent commission. If in that case the Court had jurisdiction over strangers, is there none in the present case? [The CHIEF JUDGE:—The power to supersede at the costs of the petitioning creditor is undoubted, and those who identify themselves with him render themselves amenable to the same jurisdiction. The first step here is to prove the principal party liable.] The jurisdiction is not always arrived at, even in the case adverted to, through the petitioning creditor; thus in *ex parte Paul* (c) the assignees were made to bear the costs of superseding, because they delayed an application to supersede an invalid commission till after several acts done by them. The power of the Court over assignees is most extensive; the Court has power over them in respect of all acts done in the character of assignees by virtue of or under colour of the commis-

.1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

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(a) *Wood v. Wood*, 4 *Russ.* 558.

(b) *Ex parte Boyle*, *Buck*, 247.

(c) *Ex parte Paul*, *Mont. & Mac.* 185.



1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

sion. (a) The improper acts in question involve a high contempt of court; and cannot the Court punish a contempt? In *ex parte Lund* (b) certain parties were summoned by some commissioners of bankrupt to attend before them to give evidence touching the act of bankruptcy: they neglected the summons; whereupon Lord *Eldon* ordered them to attend. [Sir *George Rose*:—The Chancellor says, the commission must be opened. The commissioners have not power to enforce attendance; the power must be somewhere; therefore I have it. But this is not the regular court for delivery up of the bills in question; the parties may go to law and bring an action of trover.] In *ex parte Cowan* (a) the Lord Chancellor gave relief, though an action for damages might have been brought at law. In *ex parte Conway* (c) all parties, including a solicitor, were drawn within the jurisdiction by fraudulent conduct to which they were accessories. This money is part of the estate, paid away improperly. Now, in equity, if a defendant having notice of a decree to which he is no party pay away money contrary to that decree, the Court will compel him to pay it over again; *Hervey v. Montague*. (d) It is true that this is a court of limited jurisdiction, by which is meant that the Court has no power over parties who are not already by some act within the jurisdiction. The foundation of bankruptcy jurisdiction is the administering the estate; the estate in the present case has sustained a loss, to recover which no action lies. In the case of a conspiracy, as foul as the present, Lord *Eldon* boldly said “if there

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(a) *Ex parte Cowan*, 3 Barn. 13 Ves. 67, and *ex parte Arrow-smith*, 14 Ves. 209.

(b) *Ex parte Lund*, 6 Ves. 781. (d) *Hervey v. Montague*, 1 Vern.

(c) *Ex parte Conway*, 13 Ves. 57, 123.; 2 Ch. C. 82.  
62. And see *ex parte Heywood*,



is no precedent I will make one." [Sir George Rose :— In many instances Lord *Eldon* made precedents in bankruptcy, for which considerable gratitude is due. Did Lord *Eldon* ever give damages before the criminality was established by the verdict of a jury? In *ex parte Conway* (a) there had been an indictment. This Court cannot try a conspiracy.] But the ground of this application is not the criminal conspiracy, but the civil fraud.

Then as to that part of the prayer of the petition which asks the delivery up of the bills. It appears that a large number of bills were delivered by the bankrupt to *Vaughan* after the bankruptcy, and distributed by him, to enable the holders to prove, &c. [Per Curiam :— If these bills were part of the estate, delivered after the bankruptcy, the Court would have jurisdiction to reach them; but it is not sufficiently proved that the delivery was after the bankruptcy.] The bills were delivered to enable fraudulent proofs to be made, and which was accordingly done. Does not this give the Court jurisdiction to order those bills to be delivered up? As to the 348*l.* received by *Williams*, he was the agent of the others, to fulfil the general fraudulent intent of obtaining possession of part of the estate; and it was decided in *Walker v. Symmonds* (b) that one trustee alone might be charged for a breach of trust.

The CHIEF JUDGE :—

I feel great difficulty in this case. That there was a gross and scandalous fraud concocted between *Vaughan* and *Baldwin* to put proofs for fictitious debts on the proceedings, appears to me, so far as the facts are before the Court, quite clear.

1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

Delivery up of  
the bills.

(a) *Ex parte Conway*, 13 Ves. 62.

(b) *Walker v. Symmonds*, 3 Swan. 77.



1836.

—  
*Ex parte*  
 BRAND  
 and others.  
 In the matter  
 of  
 SMITH.

If parties combine to put fraudulent proofs on the proceedings, it seems they are amenable to this Court for the consequences.

But the ground of this petition is, not that *Vaughan* and *Baldwin* have so acted, but that the respondents had combined to put such proofs on the proceedings in order to aid and assist *Vaughan* and *Baldwin*. If it were proved that parties had agreed to combine together to put fraudulent proofs on the proceedings, I should think them amenable to this Court for the consequences, inasmuch as each would be liable for the costs of expunging his own fraudulent proof; so as they conspired, each would be liable for the costs of expunging all the others. But the difficulty arises from this: it appears that *Vaughan* and *Baldwin* combined with each other, and that the other parties did not combine with each other, but each party combined separately with *Vaughan* and *Baldwin*; each as to his own individual debt, and no further. I find no evidence of the parties combining *inter se*. Then as to delivery up of the securities: there is no reason why any one should be responsible for the delivery up of any security in the hands of any other. The evidence does not even establish that *Beeston* now has the bills. It would be idle to order that to be delivered up which was so to the knowledge of the petitioner before his petition was presented, the ground of expunging being the payment of the bills by other parties, and consequently delivery up to them of those bills.

Refunding the dividends.

The power of ordering the refunding the dividends paid to others who have since absconded, or become insolvent, depends on the same proof of concert as already adverted to.

I cannot perceive how this Court can order *Welchman* his costs, even considering them as damages.

Concerning *Williams*, who was assignee with *Baldwin*: if *Baldwin* were aware that *Williams* was appropriating part of the estate he would be liable in account;



but I do not perceive how the other creditors are responsible for the 348*l.* abstracted by *Williams*, part of the design being that he should abscond with the property. They probably elected him as a friendly assignee, that he might not too closely examine their proofs; but as one of the Judges has a difficulty on that point it must be further discussed.

I think the Court has only power to order separate costs on each proof, which should be made on separate petitions. If the assignees still think that a combination between all parties existed, and can be proved, the petition may stand over to have a prosecution or indictment instituted.

*Mr. Russell* : — We have no objection to that; the indictment is prepared.

*Sir George Rose* : — Without prejudice to what I may further hear from counsel, and assuming the facts to be as stated on opening the petition, my present opinion is as follows : — As to the relief prayed; if these bills, now claimed as part of the bankrupt's estate, as having been paid since proved, it is a mere question of law: if they were part of the estate, obtained by the parties since the bankruptcy, for the fraudulent purpose as alleged, there can be no doubt this Court has jurisdiction to order them to be delivered up. As to the property received by default of *Baldwin*, the late assignee, now before the Court, the jurisdiction is also clear; but it is questionable as to the acts of another who absconds.

We cannot at present make any useful order, without in effect pronouncing a judgment that this is a conspiracy.

1836.

—  
*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

Delivery up of  
the bills.



1836.

—  
*Ex parte*  
 BRAND  
 and others.  
 In the matter  
 of  
 SMITH.

Mr. Kelly and Mr. Keene for *Beeston* : —

This petition ought not to stand over, but must be dismissed. The petition does not pray the costs of expunging the proof of *Beeston* ; and he has not been guilty of any act by which the estate has been damaged. This petition resembles a bill of discovery, a prosecution being threatened.

In *ex parte Hilton* (a) it was held, that where a creditor has proved it gives the Court a jurisdiction quite different to what it otherwise would have ; but then the extent of the jurisdiction which the Lord Chancellor was prepared to enforce in that case was over the dividend, which the Court would order to be refunded ; “ and,” said the Lord Chancellor, “ having got so far, and reduced you to the situation of a creditor not proving, the assignees shall go to law for payment of these sums.” [Sir George Rose : — Is not the essential question, whether the conduct of *Beeston* was such, that though the ground of jurisdiction fails, yet costs may be given against him ?] In any event this petition complaining of *Beeston* jointly with others is incorrectly framed.

Mr. Temple and Mr. K. Parker for *Baldwin* : — The question now before the Court is, whether this petition is to stand over ? *Baldwin* has not answered this petition on the merits ; he insists there is no jurisdiction to make the order prayed against him ; he denies collusion with any one, and has been removed from being assignee.

Mr. Swanston for *Philpott* : — There is no specific allegation in the petition affecting *Philpott* ; merely general charges, which require no answer.

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(a) *Ex parte Hilton*, 1 Jac. & Walk. 467.



Mr. *J. Russell* in reply: — No objection as to multifariousness can now be urged, as that is a preliminary objection, and this petition has been opened; *Ward v. Cooke* (a); *Wynne v. Callender* (b). It is now suggested that the petition should stand over to have a prosecution instituted. To that the petitioners accede; and after the prosecution there can be no doubt of the jurisdiction; *ex parte Conway*. (c)

1836.

—  
*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

The CHIEF JUDGE: —

The statement of the petition is, that *Vaughan* and *Baldwin*, fraudulently colluding together, sued out this fiat to assist the bankrupt; and that, in pursuance of their plan, *Vaughan* procured various persons to place fictitious proofs upon the proceedings. There cannot exist a grosser instance of fraud against the bankrupt laws than this case presents. But it is objected, the Court has no jurisdiction to grant the prayer of the petition. The foundation of the jurisdiction of this Court is not based on any power to issue process to bring parties before the Court, but on the circumstance that parties come before the Court in some way, and place themselves within its jurisdiction, by suing out a fiat or proving. All other jurisdiction depends on statutory enactment, the authority given by which must be closely adhered to. In this case all the respondents have come under the jurisdiction as creditors; but to what extent have they submitted to the jurisdiction? — so far as relates to the proof only: it does not follow that they submit to the order of the Court to the extent they would in equity or common law courts.

Foundation of  
the jurisdiction  
of the Court of  
Review.

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(a) *Ward v. Cooke*, 5 *Madd.* 123.

(b) *Wynne v. Callender*, 1 *Russ.* 293.

(c) *Ex parte Conway*, 13 *Ves.* 62.



1836.

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*Ex parte*  
 BRAND  
 and others.  
 In the matter  
 of  
 SMITH.  
 Jurisdiction  
 over creditors  
 proving.

As I understand the power of this Court over creditors, it extends so far as the proof and its immediate consequences extend; that is, to expunge, reduce, or modify the proof, and to restrain and modify the right to dividends according to equity. This petition prays an order which would supply the place of an action on the case for damages, consequential not to the proof alone, and its expunging, but to the election and removal of assignees also, in which many of the respondents concurred. I cannot perceive any jurisdiction to order the respondents to repay the 348*l.* which *Williams* has misapplied, that being damages; his embezzlement was a circumstance wholly foreign to their intent, and which they never contemplated when they elected him.

Refunding  
 dividend.

Welchman's  
 costs.

Delivery up of  
 the bills.

As to one person being called on to refund dividends received by another, that is yet further removed from the scope of our jurisdiction. I doubt whether there is any mode by which the assignees can recover the costs they paid for *Welchman's* defence; it was purely voluntary. As to delivery up of the bills, even the facts appear to fail; for the bills seem to have been delivered up to *Vaughan*, and destroyed; but if fictitious they are not part of the estate.

Then as to refunding dividends, and paying the costs of expunging, &c. the fraudulent proofs: the respondents would only become liable on proof that they all combined in proving a particular fictitious debt or debts of another, and that in consequence thereof costs arose which the estate paid. If, for instance, it were proved that all concurred in putting the proof of *Davis* on the proceedings, all would be liable to the consequences thereof; but there is no evidence that they combined any further than each with *Vaughan* for himself. Before assuming jurisdiction on the ground of the fraudulent proofs, I must be satisfied that the respondents were



jointly concerned. This disposes of the petition as to any joint order. But if each would be liable on a separate petition to pay costs, then the only objection would be that the petition is multifarious. But *Vaughan* is the person inducing each to prove. So far as he is concerned, therefore, each proof is his, and he is liable for the whole costs. Therefore it appears to me that the Court might not only make an order against *Vaughan*, but against each of the others, as connected with *Vaughan*. But as one of the Judges thinks this matter should go further, we will confer together to see whether any and what order can be pronounced, or whether the petition must be dismissed.

That one of the parties (*Baldwin*) was an assignee makes no difference; his liability, if any, may come before the Court on a separate petition calling on him to account. The parties are all to blame; so that if this petition should be dismissed without costs, they will have no right to complain.

Sir *John Cross* took time to consider of his judgment, as the petition was to stand over.

Sir *George Rose* : —

All this Court can properly do is to dismiss the petition, without costs as to those of the respondents who appear. As to those who do not appear, the Court will grant the petitioners such order as they think they can maintain. The bounds of jurisdiction on this occasion are clear. This, though constituted a Court of Record, has no further jurisdiction than the Lord Chancellor sitting in bankruptcy possessed. If the affidavits warranted the Court, an order could be made under which the prayer of this petition could be worked out; but that is not the case.

1836.

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*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.



1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.  
Delivery up of  
the bills.

As to the delivery up of the bills, circumstances might exist to enable the Court to make such an order, as where a petitioning creditor or assignees possess bills; and the question is, are the bills necessary as a term in a fraudulent fiat, against which the Court must protect its records? But if it be a question of adverse litigation between the assignees and any creditor, then clearly the Court has no jurisdiction.

As to the 348*l.* claimed as due from *Williams*, if *Baldwin* is in default, it is matter of account. This Court cannot make him liable for damages; but the parties have not put it as matter of account, but of damage.

As to the 688*l.* for loss, &c. by reason of the proofs, this falls within the observation that the Court cannot give damages. *Ex parte Conway* (a) settles this. The Great Seal, before the 5 Geo. 2. c. 3. s. 23. (b), had assumed jurisdiction to order damages after superseding on the ground of a contempt. But it is a question whether a false proof is such a contempt as to give jurisdiction?

Is a fictitious  
proof a con-  
tempt?

What has been done before the commissioners? The petition states the costs to have been taxed; but I ask, by whom, how, and by what authority?

If several parties concur in one fraud, in order to put several false proofs on the proceeding, all might be included in one petition without its being multifarious.

Jurisdiction of  
the Subdivision  
Court.

The parties went before the Subdivision Court. I do not stop to consider whether they acted correctly in so doing. They elected so to do. Then what is the power of that Court? It has not yet been decided that expunging a debt is within the jurisdiction of the Subdi-

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(a) *Ex parte Conway*, 13 *Ves.* 62.

(b) Now 6 Geo. 4. c. 16. s. 13.



vision Court (*a*); nevertheless it was done in this case, and the parties have acted on the order made. Now the act says (*b*), that when the Subdivision Court makes an order it is absolute for all purposes but questions of law or equity or evidence. The question of costs is not open; it is decided below, and there is no appeal as to costs; and if not a question of costs, but one of damage, then this Court has no jurisdiction. If we could order any costs, it must be against each individually,—not a gross sum.

It therefore appears to me, that all we could do was to dismiss this petition without costs.

Would any thing be gained by ordering this petition to stand over? If a conviction took place, would that give the Court any further power? I do not perceive that it would.

We, however, leave the whole question open, intimating our opinion to the assignees that public justice requires that the matter should not be permitted to sleep. I think the Court would not have allowed of the substitution of a new petitioning creditor's debt if it had been acquainted with all the circumstances of this case.

*Per Curiam* : — The assignees must establish the fact of the combination before we can grant the prayer of this petition; but, on the other hand, we cannot dismiss with costs till the respondents have totally disproved the charges against them.

Petition ordered to stand over.

This day the petition was again in the paper.

1836.  
—  
*Ex parte*  
BRAND  
and others;  
In the matter  
of  
SMITH.

July 20,  
1836.

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(*a*) See *ex parte Baldwin*, 1 Mont. & Ayr. 615.

(*b*) 1 & 2 W. 4. c. 56. s. 50.



1836.

*Ex parte*  
BRAND  
and others.  
In the matter  
of  
SMITH.

Mr. *J. Russell* stated, that an indictment had been preferred against the parties for a conspiracy, and that *Vaughan, Smith* (the bankrupt), and *Angle* were found guilty, but *Baldwin, Philpot*, and *Beeston* not guilty; and that after what fell from the Court on a former occasion it was felt the only question was now one of costs.

Mr. *Keene*, for *Beeston*, asked that the petition might be dismissed as to *Beeston*, with costs.

*Per Curiam* : — Mr. *Beeston's* interests will be consulted by waiving that claim.

The order was : — Dismiss the petition, without costs; the assignees to take theirs out of the estate.

C. of R.  
May 29,  
June 10,  
1834.

On a petition to reverse the adjudication the bankrupt will not be allowed to inspect the proceedings, where he has filed no affidavit in support of his petition.

*Ex parte* WHALLEY.—In the matter of WHALLEY.

A PETITION was presented by the bankrupt to reverse the adjudication under 1 & 2 W. 4. c. 56. s. 17.

Mr. *Ayrton* moved, that the bankrupt might have leave to inspect the proceedings previous to the hearing of the petition, the bankrupt undertaking to abide by the decision of the Court.

Mr. *Swanston* opposed this, on the ground that it was a mere fishing petition, and that the bankrupt had not yet filed an affidavit in support.

*Per Curiam* : — The Court cannot grant the motion, there being no affidavit in support of the petition. This may be a mere fishing petition.



Motion refused. Costs to stand over till the hearing of the petition.

1834.

This day the petition was called on. No affidavit had been filed in support, and, since May, the bankrupt had commenced an action to try the validity of his fiat.

Mr. *Ayrton* now asked, that the petition might stand over till after the trial at law.

Mr. *Swanston* and Mr. *Bacon*, *contra*:—The bankrupt has filed no affidavit in support, and on the former occasion undertook to abide by the decision of the Court.

Mr. *Ayrton* in reply:—The undertaking was in anticipation that an inspection of the proceedings would be allowed, which having been refused, was not binding.

*Per Curiam*:—This petition ought not to stand over. No affidavit is filed in support. It is clearly a fishing petition, and as such must be dismissed, with costs.

*Ex parte*  
WHALLEY.  
In the matter  
of  
WHALLEY.  
June 10.

When an affidavit had not been filed in support of a petition to reverse the adjudication, which was a fishing petition, and an action had been commenced, the petition was not allowed to stand over to have affidavits filed, but dismissed, with costs.

*Ex parte* HARLAND.—In the matter of TARDIEU.

June 12,  
1835.

A FIAT issued against *Mary Tardieu*, on the petition of *Harland*. This was a petition by *Harland* to annul the fiat, on the ground that *Mary Tardieu* was a feme covert. No person was served, and the bankrupt was out of England.

In the affidavit in support *Harland* deposed that since the fiat issued he had been “informed and believed” that *Tardieu* was a feme covert.

A fiat will not be annulled on an *ex parte* application by the petitioning creditor merely stating he “believes” the bankrupt to be a married woman.



1835.

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*Ex parte*  
 HARLAND.  
 In the matter  
 of  
 TARDIEU.

Mr. *Keene*, for the petition, stated, the application was to save further expence, and prevent an application to annul by any other creditor.

*Per Curiam* : — This fiat ought not to be annulled on “information and belief” only; but the further prosecution of the fiat may be suspended.

Prosecution of fiat suspended till further order.

C. of R.  
 July 29,  
 1835.

A person bought shares in a joint stock banking company with another's money, and told the secretary he was to hold as trustee for another, and on the same day as the act of bankruptcy he executed a declaration of trust: Held, the shares were in his reputed ownership.

*Ex parte* JOHN CHARLES ORD.—In the matter of RALPH ORD.

IN 1833 a joint stock banking company was established, under the 7 Geo. 4. c. 46. By a resolution held previously to the formation of the company, it was resolved only “principals” should be shareholders, unless the assent of the directors was obtained; but this condition was not embodied in the deed of settlement. At the bankruptcy of *R. Ord* forty shares stood in his name. This was a petition by *C. F. Ord*, praying that the assignees might do all necessary acts to transfer certain shares to the petitioner. The petition stated, that he being merely a “clerk,” and being therefore unable to hold shares as a “principal,” requested the bankrupt to hold the shares in his own name, the petitioner furnishing the necessary funds: that the petitioner did not give any notice to the company of the fact, because by the deed of settlement the company were not bound to notice or be affected with any express notice of any trust or equitable shares: that petitioner considered he did not incur any risk in allowing the bankrupt to continue in possession, on account of a clause in the deed of settlement that the production of any certificate shall at all times be good *prima facie* evidence of the title, to



whom the same shall be issued, to the shares included therein; that the certificates of the shares in question had constantly been in his (the petitioner's) possession; and that, by another rule, no shares could be transferred till after 1835: that the bankrupt had repeatedly declared the shares were the petitioner's.

On the 7th of April 1835 the bankrupt executed a declaration of trust in favour of the petitioner. On the 14th of April 1835 a fiat issued against the bankrupt on an act of bankruptcy,—a trust deed executed on the 7th of April 1835.

It appeared that there were two kinds of certificates: one referred to in the deed, delivered out as proofs of being a partner when all the calls were paid up, which had not been done in this case; another certificate given as a kind of receipt for instalments only; and the petitioner had the latter class only in his hands. By a clause in the deed the registered owner was to be, for all intents and purposes, considered by the company as the real owner.

Although the petition stated that no notice was given to the office, yet an affidavit in support stated that, at the time of the purchase (in 1833), the bankrupt informed the secretary of the company that he was to hold the shares as trustee for the petitioner.

Mr. Koe for the petition:—The written declaration of trust being made the same day as the act of bankruptcy, it must be admitted that the petitioner cannot rest his claim on that declaration (a); but long anterior

1835.

*Ex parte*  
ORD.

In the matter  
of  
ORD.

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(a) *Quære*, see *Gardner v. Rowe*, 15 *East*, 21; *ex parte D'Obree*, 2 *Sim. & Stu.* 346, S. C.; 5 *Russ.* 8 *Ves.* 82; *Wydown's case*, 14 *Ves.* 258. And see *ex parte Smith*, 87; *ex parte Dufrene*, 1 *Beames, Buck*, 140; *Darby v. Smith*, 8 *Ter.* 54; and *Thomas v. Desauges*, *Rep.* 82; *Arbouin v. Williams*, 2 *Barn. & Adol.* 586. 1 *Ry. & Moo.* 74; *Jones v. Dwyer*,



1835.

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*Ex parte*  
 ORD.  
 In the matter  
 of  
 ORD.

to that the secretary of the company had notice, in conversation, from the bankrupt, that he was merely a trustee; a fact of which the bankrupt has also informed many other persons. The bankrupt therefore gained no credit by the shares standing in his name, which he could not sell without production of the certificates, which were never out of the possession of the petitioner. *Ex parte Watkins* (a) is directly in support of this petition.

Mr. *Swanston* and Mr. *Wright* *contra* were stopped by the Court.

The CHIEF JUDGE:—These shares were both in the order and disposition and in the reputed ownership of the bankrupt: they were purchased with the money of the petitioner (who was consequently the true owner) without any fair ostensible reason; I perceive no motive for this, but what the statute (b) intends to avoid, viz., giving false credit. The bankrupt appeared owner on the books, and might have transferred the shares without production of the certificates referred to; he was apparent owner, and the company did not permit one person to hold shares for another, whereas in the company in question—*ex parte Watkins* (a)—there was a well known practice for one person to hold shares for another, and therefore the mere possession of shares was no sufficient index of ownership.

Sir *John Cross*:—The intent here was to give false credit; the certificates must have been openly delivered

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(a) *Ex parte Watkins*, 1 Mont. Burbridge, erroneously called *ex* & *Ayr*. 689. But the decision *parte Watkins*.)  
 there was reversed on appeal, (b) 6 Geo. 4. c. 16. sect. 72.  
 2 Mont. & *Ayr*. 348., (*ex parte*



to the bankrupt from the company, and the retention of them by the petitioner was secret.

1836.

*Ex parte*  
ORD.

Sir *George Rose* :—The shares were clearly in the reputed ownership. There was no notice to the office.

In the matter  
of  
ORD.

Petition dismissed with costs.

*Ex parte* HUTCHINSON.—In the matter of HUNT.

C. of R.  
Nov. 3 & 12,  
1835.

SOME mortgaged premises were put up for sale by order of the commissioners. *Rhodes* was declared the purchaser for 310*l.*, and was the agent of *Stott*. *Shaw* was also bidding, but was prevented making any further advance by some untrue observations of *Stott* depreciating the value of the premises, and which observations were made with intent to prevent *Stott* being the purchaser. This coming to the knowledge of the assignees, they refused to complete the purchase, whereon *Rhodes* filed a bill for specific performance, to which the assignees put in their answer, and then the plaintiffs dismissed his bill with costs. This was a petition by the assignees stating the above facts at length, and that the premises were worth 500*l.*, and praying as follows :—Your petitioners therefore humbly pray your Honours to rescind the agreement for sale with the said *C. Rhodes* ; to declare the said sale and purchase to be null and void ; and to order the said premises to be re-sold, without prejudice to any remedy your petitioners may have against the said *R. Stott* for damages, or for any loss, costs, damages, or expenses which they have sustained as assignees as aforesaid by the aforesaid fraudulent misrepresentations of him the said *Richard Stott* ; and

Biddings opened on a sale of mortgaged premises, on an advance of 190*l.* on 310*l.*



1836.

*Ex parte*  
HUTCHINSON  
In the matter  
of  
HUNT.

that the costs of this application and incident thereto may be ordered to be paid by the said *Richard Stott* and *C. Rhodes*, or one of them.

When this case came on on the 3d of November it was alleged that Mr. *Shaw* would advance 500*l.* on the biddings, whereon the petition stood over to have Mr. *Shaw* served with the petition, to give him an opportunity of appearing by counsel, Sir *George Rose* observing that there might be no ground in equity for opening the biddings on behalf of *Shaw*, as he might have asked the auctioneer whether what *Stott* said was true; but that it being a bankruptcy, if *Shaw* offered 500*l.* there was an advantage for all, and a surplus fund for costs.

Nov. 12.

Mr. *Moore*, for the petition, stated that *Shaw* was not willing to bid so much as 500*l.*, and did not appear; but that a Mr. *Kershaw* was willing to advance 500*l.*

Mr. *Geldart* consented for Mr. *Kershaw*.

Mr. *Swanston* and Mr. *Bethell* for the other respondents (*Stott* and *Rhodes*) did not oppose.

Ordered. That the biddings be opened at an advance of 500*l.* by Mr. *Kershaw*, he undertaking to act in the matter as the Court shall direct. Costs of all parties out of the advanced bidding. (*a*)

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(*a*) Sir *Edward Sugden*, speaking of opening biddings in equity, says, "It seems to have been thought, that the same rule may be extended to sales under a commission (*ex parte Partington*, 1 *Ball. & Beat.*\*) This however never has been done, nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place. *Sugd. Vend. & Pur.* 59. Edit. 8.

\* See 1 *Rose*, 367.



In the matter of POCKLINGTON.

C. of R.  
Dec. 19,  
1835

THE common petition for the distribution of unclaimed dividends was, in April 1834, presented under 6 Geo. 4. c. 16. s. 110., which enacts, that “the Lord Chancellor, or the said commissioners, may order the investment of any unclaimed dividends in the public funds or in any government security, for or on account of the creditors entitled, and subject to such order as the Lord Chancellor may think fit to make respecting the same, who, if he shall think fit, may, after the same shall have remained unclaimed for the space of three years from the declaration of such dividends by the commissioners, order the same to be divided amongst and paid to the other creditors; and the proof of the creditors to whom such dividends were allotted shall from thenceforth be considered as void as to the same, but renewable as to any future dividends, to place them *pari passu* with the other creditors, but not to disturb any dividends which shall have been previously made.”

The Court of Review has no jurisdiction to order distribution of unclaimed dividends: but can order distribution to creditors claiming.

Under that petition the usual reference was made to Mr. Gregg, to insert advertisements for the unclaiming creditors to come in, &c. Mr. Gregg made his report as usual, after which the 5 & 6 Will. 4. c. 29. was passed, section 5. of which is as follows:—“And whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled ‘An act to amend the laws relating to bankrupts,’ it is amongst other things enacted, that the assignees shall file a certificate in the office of the Lord Chancellor’s secretary of bankrupts, containing an account of the names of creditors to whom unclaimed dividends are due, and of the amount of such dividends; and power is thereby given for the investment of such dividends; and after



1835.

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In the matter  
of  
POCKLINGTON.

the expiration of three years the Lord Chancellor is empowered to order the same to be divided amongst and paid to the other creditors in manner therein mentioned; be it enacted, that so much of the said act as directs the filing of the said certificate, and the investment, division, and payment of such unclaimed dividends, be and the same is hereby repealed." 5 & 6 Will. 4. c. 29. s. 5.

Section 6. of the same statute enacts, "that all dividends unclaimed as herein-after mentioned, and also any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided amongst the creditors of any bankrupt, shall be paid into the Bank of England to the credit of the accountant-general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to an account to be intituled 'The Unclaimed Dividend Account,' subject to the order of the Lord High Chancellor or of the Court of Review in Bankruptcy, or of any commissioner of the said Court, for the payment thereof of any dividend or dividends due to any creditor or creditors, and subject also to the order of the Lord Chancellor for the laying out and investment thereof in the purchase of government or parliamentary securities, which securities shall be carried to the before-mentioned account to be intituled 'The Bankruptcy Fund Account,' and shall be subject to such rules and regulations as the said Lord Chancellor shall direct: provided always, that any order of any commissioner for payment of any dividend, under the provisions aforesaid, shall be subject to appeal to the said Court of Review." 5 & 6 W. 4. c. 29. s. 6.

This was an application to confirm Mr. *Gregg's* report, and for an order for the distribution of the unclaimed dividends, as had heretofore been usual.



Mr. *Swanston* for the petition :—

1835.

The question is, whether the 5 & 6 Will. 4. c. 29. deprives the Court of jurisdiction to order the distribution of unclaimed dividends. The sixth section of that act declares that unclaimed dividends are “subject to the order of the Lord High Chancellor or of the Court of Review in Bankruptcy, or of any commissioner of the said Court, for the payment thereof of any dividend or dividends due to any creditor,” &c. [The CHIEF JUDGE:—That is, any creditor who comes in and claims his dividend.] The act cannot be so construed; because the first part of section 6. enacts, “that all dividends unclaimed as herein-after mentioned, and also any undivided surplus of a bankrupt’s estate,” &c. shall be invested, &c, subject to the order for payment of any dividend to any creditor; now the surplus cannot be liable to any payment of dividend. This loose way of wording the act leaves the Court more at liberty to construe it liberally, without which the bankrupt would be deprived of his surplus; for though the act directs the surplus to be invested, it gives the Court no express power to direct it to be paid over to the bankrupt. The Court is not asked to make a new order, but merely to carry into effect an order made before the 5 & 6 Will. 4. passed.

In the matter  
of  
POCKLINGTON.

The CHIEF JUDGE:—The 5 & 6 Will. 4. c. 29. s. 5. deprives this Court of all the power it had under the 6 Geo. 4. c. 16. s. 110., and in section 6. gives a new power instead. Under that 6th clause, I think the Court can confirm the report of Mr. *Gregg*, so far as to order payment to those creditors who have come in under the advertisements and have claimed their dividends, but not to order distribution of the unclaimed



1835. dividends as heretofore. If the Court still possessed the power, for what purpose was the 5 & 6 Will. 4. c. 129. s. 5. passed?  
 —  
 In the matter of  
 Pocklington.

*Sir John Cross and Sir George Rose concurred.*

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C. of R.  
 Dec. 19,  
 1835.  
 Same point as  
 at page 729.

*Ex parte BREMIDGE.* — In the matter of COOKE.  
 ON 22d January 1835, usual reference made. Mr. *J. Russell* now asked that Mr. *Gregg's* report, made under circumstances similar to the above case, might be confirmed, and the unclaimed dividends distributed.

*Per Curiam*: — The Court can only confirm the report as to the creditors who come in and claim their dividends.

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C. of R.  
 April 29,  
 1836.

*Ex parte CURTIS.*

Where the Court has made an order for distribution of unclaimed dividends before the 5 & 6 W. 4. c. 29. passed, the commissioner may proceed to distribution after the passing of the act.

IN 1834 the usual petition was presented for distribution of unclaimed dividends, and the then usual order made. Mr. *Gregg* had made his report, whereon the then usual order was made for distribution of the unclaimed dividends. Before the commissioners had made the distribution the 5 & 6 Will. 4. c. 29. passed, and he conceived that it deprived him of jurisdiction to distribute. This was a petition for an order for distribution of the unclaimed dividends by the commissioners.

Mr. *J. Russell* for the petition.



*Per Curiam* : — The 5 & 6 Will. 4. c. 29. s. 5. (a) deprived this Court of the power to make any “order,” but here the order was made before the act was passed, and all the Court now does is to carry the former order into effect, by directing the commissioners to distribute the dividends accordingly.

1836.

*Ex parte*  
CURTIS.

The other Judges concurred.

Unclaimed dividends ordered to be distributed.

*Ex parte* BELL. — In the matter of EWER.

C. of R.  
May 3,  
1836.

THE common petition for distribution of unclaimed dividends had been presented, and the usual reference made to Mr. Gregg under 6 Geo. 4. c. 16. s. 110 (a), after which the 5 & 6 Will. 4. c. 29. passed. (b) Mr. Gregg then made his report.

Same point as  
at page 729.

Mr. *Bethell* now asked an order for distribution of the unclaimed dividends. He contended that the 5 & 6 Will. 4. c. 29. had not deprived the Court of power to make the order, and though the legislature might have intended otherwise, yet *quod voluit non dixit*. The 6th section (b) of 5 & 6 Will. 4 c. 29. enacts, “that all dividends unclaimed as herein-after mentioned” “shall be paid into the Bank of England to the credit of the accountant general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned

(a) See the clause at length, *ante*, page 728.

(b) See the clause at length, *ante*, page 730.



1836.

—  
*Ex parte*  
BELL.  
In the matter  
of  
EWER.

officer shall be appointed." Now the only unclaimed dividends therein-after mentioned are those referred to in section 7, which enacts "that if any assignee under any commission of bankrupt or fiat in bankruptcy now issued or hereafter to be issued shall have, either in his own hands or at any bankers, or otherwise subject to his order or disposition, or shall know that there is or are in the hands or subject to the order and disposition of himself, and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends amounting in the whole to the sum of 20*l.*, or any such undivided surplus as aforesaid amounting to the sum of 20*l.*, such assignee shall as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends, within three calendar months," &c. Now it is clear from the wording of this clause that it is prospective only, and not retrospective. It is also asked that the costs of this application may come out of the unclaimed dividends.

*Per Curiam* : — These unclaimed dividends have actually been paid over to the accountant in bankruptcy, so that the act attaches to them. The Court cannot do more on the present application than has been done on former applications, viz. order their dividends to those creditors who have come in and claimed. The costs must come out of the dividends of the claiming creditors. The Court has no power to order them out of the unclaimed dividends.



*Ex parte* DIGBY and JONES. — In the matter of  
BLENKIN.

And

*Ex parte* BUCKTON. — In the matter of BLENKIN  
and SHACKLETON.

C. of R.  
Dec. 22,  
1835.

ON the 26th May 1835 a fiat issued against *Blenkin*, under which *Digby* and *Jones* were chosen assignees; and the certificate of *Blenkin* was advertised for allowance on the 28th of August 1835.

A separate fiat issued, under which the certificate lay for confirmation; a joint fiat subsequently issued; the separate fiat was impounded to give effect to the subsequent joint fiat, and the proofs, &c. under the separate fiat transferred to the joint fiat.

On the 23d July 1835 a joint fiat issued against *Blenkin* and *Shackleton* as partners, under which *Buckton* was appointed sole assignee.

On the 17th of September (the day before allowance of *Blenkin's* certificate) *Buckton* presented a petition to stay *Blenkin's* certificate, and to annul or impound the separate fiat against *Blenkin*, and to transfer the proceedings, &c. to the joint fiat.

*Digby* and *Jones* then presented a cross petition, praying to annul the joint fiat.

The petition of *Digby* and *Jones* alleged that there was no partnership between *Blenkin* and *Shackleton*, but that the latter was only the agent of the former, and that he never was reputed a partner; and the petition stated many facts as evidence thereof, and that the claim of partnership was an after-thought of *Shackleton* to get rid of some liabilities to the estate of *Blenkin*; that the debts proved under the separate estate of *Blenkin* amounted to 7,330*l.*; that the only debts proved under the joint fiat were a debt of 202*l.*, the petitioning creditor's, which was on a bill accepted by *Blenkin*, and 8*l.* 13*s.* for expenses of a journey undertaken for *Blenkin*. The petition stated, that *Blenkin* surrendered under the



1835.

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*Ex parte*  
 DIGBY  
 and another.  
 In the matter  
 of  
 BLENKIN.  
 And  
*ex parte*  
 BUCKTON.  
 In the matter  
 of  
 BLENKIN  
 and another.

joint fiat, and at his request his last examination thereunder was adjourned to the 23d of November; but the last examination of *Shackleton* was adjourned on account of dissatisfaction expressed by the commissioners. When *Blenkin* surrendered under the joint fiat he gave all parties notice that the joint fiat was an improper one. The petition alleged, that if a partnership did exist between *Blenkin* and *Shackleton* it was a dormant one, and all the property, if any, would be considered the separate property of *Blenkin*.

The petition charged culpable delay in the proceedings under the joint fiat; viz. that the separate fiat issued in May; that every meeting thereunder was attended by the person who became petitioning creditor under the joint fiat, which was not issued till 23d of July, was opened on the 7th or 8th of August, and the meeting for the choice of assignees not held till 2d September; so that ten weeks elapsed between issuing the separate fiat and issuing the joint fiat, when *Blenkin* passed his last examination, and his certificate was laying for confirmation, when nearly all his personalty and stock in trade was sold, and every thing prepared for sale of the real estates; that, assuming the partnership, prosecuting the separate fiat will be the least expensive and most equitable and beneficial mode of administering the estate.

The petition of *Digby* and *Jones* prayed to annul or impound the joint fiat, and that such directions might be given as to the creditors who had proved, and as to the property got in under the joint fiat, as to the Court might seem meet.

The petition stated, that the only evidence of partnership was from the final examination of *Blenkin*, wherein he stated that a partnership existed. But the



petitioners stated, that in such examinations *Blenkin* only intended to state, that during the last two years it was understood that *Shackleton* should be remunerated for his services to *Blenkin* by payment of a sum equal to half the profits of the business, in lieu of 100*l.* a year which he had heretofore received, and that partnership never was contemplated.

Mr. *Swanston* and Mr. *Mylne* for the petition *ex parte Digby* : —

The petitioners contend that no partnership existed, or if it did, that *Shackleton* was a dormant partner, and consequently that there was no joint property, as the property would then be in the reputed ownership of the ostensible partner. (a) The evidence proves that *Shackleton* held himself out as the agent only of *Blenkin*.

The rule of this Court, where there is both joint and separate estate, is, that if the separate fiat interferes with the joint it will be superseded, unless the separate fiat prove more convenient, when the joint may be impounded; but that rule cannot apply where, there being no partnership, and therefore no joint property, a joint fiat cannot be supported; *ex parte Hamper* (b); more especially where a valid separate fiat subsequently issues.

Nothing can be done under the joint fiat, which is therefore useless; and if so, why should it stand? Under the separate fiat many thousand pounds worth of debts have been proved; under the joint fiat only one

1835.

*Ex parte*  
DIGBY  
and another.  
In the matter  
of  
BLENKIN.  
And  
*ex parte*  
BUCKTON.  
In the matter  
of  
BLENKIN  
and another.

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(a). *Ex parte Enderby*, 2 Barn. Chuc, Mont. 364. 457. See also  
& Cres. 393; *Smith v. Watson*, *ex parte Dyster*, 2 Rose, 256.  
2 Barn. & Cres. 401; *ex parte* (b) *Ex parte Hamper*, 17 Ves.  
*Jennins*, Mont. 45; *ex parte* 403.



1835.

debt of 208*l.*, being the alleged petitioning creditor's debt.

*Ex parte*  
DIGBY  
and another.  
In the matter  
of  
BLENKIN.  
And  
*ex parte*  
BUCKTON.  
In the matter  
of  
BLENKIN  
and another.

Mr. *Ching* and Mr. *J. Russell* for *ex parte BUCKTON*.

Mr. *Duckworth* for *Blenkin*.

Mr. *Ellis* for *Shackleton*.

The CHIEF JUDGE:— That they were not partners in fact is no answer to the petitioning creditor, who has a right to treat them as partners. In the case cited (*a*) there were two separate commissions, and a certificate lying for allowance under one of them; and the assignees under a joint commission wished to stay the certificate and supersede; and Lord *Eldon*, after going through the facts of the case, saw no ground for believing there was any joint property; and as he thought the separate commission more convenient, and the certificate had been obtained thereunder, he would not interfere with the separate commission, but found it more convenient to supersede the joint commission, and administer any joint estate there might be under one of the separate commissions. In this case it comes to this, — does the joint commission cause any inconvenience to the separate creditors? I can perceive none. The joint commission is legal; and if hereafter any injury arises from the joint commission, let the creditors under the separate come to this Court. If all the property is separate estate (as having been in the reputed ownership of *Blenkin* alone), it will be administered under the separate commission; otherwise under the joint.

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(*a*) *Ex parte Hamper*, 17 *Ves.* 403.



The evidence proves that the joint fiat is capable of being supported at law ; and then the question is, which fiat is it most expedient to permit to stand? Now there may have been such dealings as would render it necessary to join *Shackleton* as well as *Blenkin* in any action ; it is therefore expedient that a joint fiat should exist, the assignees under which would represent both, taking care, however, to leave with the assignees under the separate commission the administration of the separate estate under that joint fiat, which will prevent all injury to the separate creditors. This is not the ordinary case of a joint fiat issued subsequently to a separate one.

*Sir George Rose* : — It appears to me, that as the joint commission has existed so long, that if there were no separate commission it would not be of course to supersede the joint commission. But the commission can only act on the estate ; and if there be no joint estate there can be no joint commission. To supersede this joint commission would leave the question of partnership where it is. The question here is, Do the assignees under the separate commission declare that there is separate property which the existence of the joint commission prevents them from getting in, and do the assignees under the joint commission admit that there is no joint property? If so, it is of course to supersede the joint commission ; but if the assignees or the creditors under the joint fiat contend that there is joint property, we ought to allow the joint commission to stand, to enable them to recover it, as a subsequent joint fiat is waste paper as to the creditors under a previous separate fiat. Whether there be or be not joint property is a question to be litigated, and there-

1835.

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*Ex parte*  
DIGBY  
and another.  
In the matter  
of  
BLENKIN.  
And  
*ex parte*  
BUCKTON.  
In the matter  
of  
BLENKIN  
and another.



1835.

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*Ex parte*  
 DIGBY  
 and another.  
 In the matter  
 of  
 BLENKIN.  
 And  
*ex parte*  
 BUCKTON.  
 In the matter  
 of  
 BLENKIN  
 and another.

fore we ought not to supersede the joint commission. This petition concludes, that even if there were joint property, yet it would be more conveniently administered under the separate commission. If so, the Court might probably supersede the joint commission; but that fact must be most satisfactorily proved to the Court.

There exist two separate fiats, as was the case in *ex parte Hamper (a)*; and this Court acts on the same principle which governed in that case, viz. convenience. Whether *Shackleton* was a dormant partner is, to say the least, doubtful; and as there may exist a partnership, this Court is unwilling to interfere with the rights of the joint creditors. Instances may exist where a claim against a partner is available against him under a separate fiat, but the safer course is to issue a joint fiat. It never has been held, and perhaps never will be held, that the mere want of joint estate is alone sufficient reason to supersede a joint fiat, when a partnership does exist, and therefore a joint cause of action.

In this case, if *Shackleton* was a dormant partner the property may have been in the reputed ownership of *Blenkin*, and therefore distributable under his separate fiat. Of that possibility the Court will not lose sight in considering what is to be considered joint property. In strictness there might be joint property at the moment of bankruptcy, which would only be distributable under the separate fiat, as having been in the reputed ownership of *Blenkin*. But we must not lose sight of what is due to *Blenkin*; his certificate lies before this Court for allowance, and therefore we cannot supersede as to him. Parties coming here to supersede

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(a) *Ex parte Hamper*, 17 Ves. 403.



a joint fiat must show a right. This joint commission has gone on some time. The separate fiat must stand, to enable the right as to reputed ownership to be worked out, if it exist.

The order which was made in the matter of both petitions was as follows : —

Let the separate fiat be impounded in the registrar's office, with liberty for the assignees thereunder to apply for its production for all necessary purposes. Let the proofs and other proceedings under the separate fiat be transferred to the joint fiat. Let the assignees under the separate fiat continue to act in respect of *Blenkin's* separate estate; and let his separate creditors be at liberty to elect other assignees, if occasion should require. Let the commissioners under the joint fiat be at liberty to appoint a meeting for the surrender, &c. of *Shackleton*.

Costs of the petition *ex parte Buckton* to be paid by *Buckton*, with liberty to retain same either out of the joint estate or the separate estate of *Shackleton*, as the commissioners under the joint fiat should direct. Costs of *ex parte Digby* by each party out of own estate, except costs of *Blenkin* and *Shackleton*, which are to come out of the separate estate.

1835.

—  
*Ex parte*  
DIGBY  
and another.  
In the matter  
of  
BLENKIN.  
And  
*ex parte*  
BUCKTON.  
In the matter  
of  
BLENKIN  
and another.



COURT OF  
COMMON  
PLEAS.October 28,  
29, 30, & 31,  
1835.

Where an order for an issue from Chancery directs all witnesses to be examined, but the plaintiff declines to call some, conceiving his case made out, it seems the judge will himself call the others.

## GROOM v. CHAMBERS.

THE issue ordered in *ex parte Chambers*, reported, *ante*, page 143, now came on for trial in the Common Pleas. The issue was, whether, at the time of suing out the commission, *Chambers* the elder had committed an act of bankruptcy; notice to be given by the assignees of what acts of bankruptcy they intended to rely upon; and all witnesses who had been examined on the former trials were to be examined again on the issue.

Mr. Serjeant *Pollock*, Mr. Serjeant *Wilde*, Mr. Serjeant *Kelly*, Mr. *G. V. Richards*, and Mr. *Arnold* for the plaintiff.

The *Attorney General*, Sir *W. Follett*, Mr. *Alexander*, and Mr. *Wightman* for the defendant.

Oct. 30. This day the plaintiff closed his case, having called all the witnesses he conceived were material to his case. Many other witnesses, however, remained, who were persons that on former occasions had been examined on behalf of the present defendant.

The *Attorney General*: — We are of opinion that the plaintiff has not proved any act of bankruptcy to have been committed, and we therefore do not intend to call any witnesses.

*Tindall*, C. J.: — In plain English, you wish to prevent a reply.

Sir *W. Follett*: — The order of the Lords Commissioners directs “all witnesses to be examined, or such of them as the plaintiff by due diligence may procure.” Under this the plaintiff is bound to summon them, and to call them.



Mr. Serjeant *Wilde* : — The plaintiff was ordered to procure the attendance of the witnesses, in order to prevent the expense falling on the bankrupt, *Chambers*.

1835.  
—  
GROOM  
v.  
CHAMBERS.

*Tindall*, C. J. : — It would be a strong interpretation of the order to declare that the plaintiff must call the defendant's witnesses; in that case the defendant would cross-examine those who were his own witnesses on former trials. If this were a common trial at nisi prius there would be no difficulty; there, if the defendant calls no witnesses, the plaintiff has no reply; but on this occasion I must be guided by the order of the Lords Commissioners. Now, if I did not call and examine "all" witnesses, the cause might perhaps be sent back for trial again. I must put some construction upon the order. The plaintiff has already produced much evidence, which it is obvious he would not have produced if he had not been bound so to do by the order that "all" should be examined. Why then should I stop short in favour of the defendant? If, however, the plaintiff refuses to call the witnesses, he may leave the cause to the jury; I shall then call the witnesses myself; then the plaintiff will make observations on the evidence, and the defendant must be at liberty to reply to such observations.

The *Attorney General* : — If your Lordship will permit this case to stand over till to-morrow, there is every probability of a compromise.

The case stood over till next day; it was then stated that a compromise was in progress, and the case stood over.



LORD  
CHANCEL-  
LOR.  
*July 9,*  
1836.

*Ex parte* CHAMBERS — In the matter of  
CHAMBERS.

THIS case, which is reported, *ante*, page 440, has been compromised; Mr. *Chambers* receiving 23,400*l.* out of the estate, and agreeing not to further contest his commission.

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MARSH *v.* KEATING.

HOUSE of  
LORDS.

THIS case, which is reported, *ante*, vol. i. page 592, and is also reported in 2 *Clarke & Tinelly*, 251, has been compromised; the Bank of England receiving 95,000*l.* out of the estate of *Marsh, Stacey*, and Company, in full of all demands.

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COURT of  
REVIEW.  
*March*  
1836.

*Ex parte* ABEL SMITH and THOMAS HUGHES  
ANDERDON.—In the matter of WILLIAM MAN-  
NING, FREDERICK MANNING, and JOHN  
LAVICOT ANDERDON.

THE order made in this case (*ante*, page 536) was this day altered, on the application of Mr. *Reynolds*, on a petition presented by all the four trustees, praying to prove, and that the dividends might be paid to them; and the assignees consenting, it was ordered accordingly.

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# DIGEST

OF THE

## CASES REPORTED IN THIS VOLUME,

AND OF

## THE CONTEMPORARY CASES

DECIDED IN ALL THE OTHER COURTS.

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### ABSENTING.

*See* ACT OF BANKRUPTCY, 1 to 6.

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### ACCEPTANCE OF BILL.

*See* SET-OFF, 3.

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### ACCOMMODATION BILL.

*See* PROOF, 12.

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### ACCOUNTS.

*See* ASSIGNEES, 1.—PETITIONS, 4.

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### ACQUIESCENCE.

1. Neither surrendering, interfering in the choice of assignees, interposing as to the disposition of the estate, passing the last examination, nor endeavouring to obtain the certificate, are acts of acquiescence. *Ex parte Chambers*, 2 Mont. & Ayr. 440. S. C. 1 Dea. 197.

2. A party is not bound by acquiescence when ignorant of his rights. *Ex parte Chambers*, 2 Mont. & Ayr. 474. S. C. 1 Dea. 197.

*See* EVIDENCE, 6.—INJUNCTIONS, 3, 4.

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### ACT OF BANKRUPTCY.

#### *Absenting.*

1. The bare neglect to keep an appointment to meet a creditor does not amount to an act of bankruptcy.

VOL. II.

A country trader having been arrested on a bill, and having put in bail, promised to attend next day to pay the same; he however went to London to procure funds, and wrote to the creditor that that would prevent his keeping the appointment: Held, not an act of bankruptcy by absenting, there being no intent to delay. *Ex parte Lavender*, 2 Mont. & Ayr. 11. S. C. 4 Dea. & Ch. 484.

2. On the 17th, Pearson sent a letter from his dwelling-house at Greenwich to his son at his place of business, stating that he was unable to meet his engagements, and desiring to be denied to any creditor who might call. He immediately left home, and remained absent that and the following day. On the 18th he called at his sister's, and expressed an apprehension of being sent to the Fleet, and stated he was in no hurry to get home, and should not go very early, as he had creditors who would lay hold of him, (but this was not true); and he stayed till dark: Held, he committed an act of bankruptcy by absenting, though the jury found that the statement to the sister was untrue, and that evidence of his conduct and conversations on the 19th was not admissible to explain his conduct on the 18th. *Johnson v. Woolf*, 2 Scott, 372.



## DIGEST.

### ACT OF BANKRUPTCY— *continued.*

3. He was not less a bankrupt because he told a falsehood. Per Tindal, C. J. *Johnson v. Woolf*, 2 Scott, 376.

4. An act of bankruptcy once committed cannot be purged by any thing which takes place afterwards. Per Park, J. *Johnson v. Woolf*, 2 Scott, 376.

5. The act of absenting is in itself ambiguous, and may be explained. Per Tindal, C. J. *Johnson v. Woolf*, 2 Scott, 375.

6. The writing the letter was very like a beginning to keep house; but he thought better of it, and ran away. Per Tindal, C. J. *Johnson v. Woolf*, 2 Scott, 375.

#### *Assignments, Conveyances, &c.*

7. A trader assigned all his property in trust to pay off a mortgage, and afterwards to discharge all his just debts: Held, upon the words of 6 G. 4. c. 16. s. 3., that this assignment must be taken to have been made with intent to defeat or delay his creditors; for delay being the necessary consequence of the act of assignment, it must be taken to have been intended; and no evidence is necessary of the intention with which it was executed. *Stewart v. Moody*, 5 Tyrwhitt, 493.

8. If nothing is previously due from a trader to parties about to advance him money, a mortgage to them of his whole effects would be valid, the effect of such transfer being only the substitution of one sort of security for another, viz. money for goods. Per Lord Lyndhurst. *Carr v. Burdiss*, 5 Tyrw. 140. See also *Robinson v. Greenwood*, 1 Mont. & Ayr. 1.

9. So a sale of the whole of a

trader's property is not an act of bankruptcy. *Rose v. Haycock*, 1 Adol. & Ellis, 460, note. See *Manton v. Moore*, 7 Ter. Rep. 67; *Whitwell v. Thompson*, 1 Esp. 72; *Hunter v. Mortimer*, 10 Barn. & Cres. 44.

10. In a case before Baron Alderson at Winchester, a carter assigned his cart and horses, which formed his whole stock in trade; and, after argument, the Court held, that the assignment could only operate as an act of bankruptcy, where it was such as to produce insolvency. Dictum per Park, B. *Carr v. Burdiss*, 5 Tyrw. 141.

11. F. and S., traders in partnership, being in insolvent circumstances, entered into a deed of composition with their joint creditors, whereby they engaged to pay them 4s. 6d. in the pound upon the amount of their respective debts, by three instalments, F. and S. retaining possession of the stock in trade, and the creditors engaging to release them on payment of the last instalment. By the same deed F. assigned to the trustees a policy of assurance upon his life (which constituted his entire separate property) in trust to pay out of the proceeds the balance of the debts due to the joint creditors, and the surplus, if any, to his (F.'s) personal representatives. Two years after the date of assignment a fiat issued against F. In an action brought by the assignees under the fiat against the trustees named in the deed to recover the policy, S., who was called as a witness, stated, that, at the time of the execution of the deed, his partner and himself entertained hopes of retrieving themselves: Held, that the assignment of the policy under these circumstances did not constitute an act of



## DIGEST.

### ACT OF BANKRUPTCY— *continued.*

bankruptcy: Held also, that it was properly left to the jury to say whether the deed was honestly and bonâ fide entered into for the purpose of enabling F. and S. to continue to carry on their trade, or with intent to defeat or delay any particular class of creditors, or whether the deed was voluntary, and a fraudulent preference given by F. to the joint creditors of the firm. *Abbott v. Burbage*, 2 Scott, 656. S. C. 2 Bing. (N. S.) 444.

12. A trader being indebted to his bankers in 13,147*l.*, assigned to them all his leaseholds and fixtures and stock, to secure money then due, or thereafter to become due, with a power of sale, but he to remain in possession till default in payment. He was at the time possessed of other property worth 13,000*l.* On an action by the assignees to recover the property, the jury found the deed was executed, not in contemplation of the bankruptcy, but to give the trustees means of taking possession in the event of bankruptcy: Held, the assignment was good, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 5 Tyrw. 136

13. Quære, Whether payment of a country bank note to a creditor, without pressure, with intent to prefer him to other creditors, is an act of bankruptcy within 6 Geo. 4. c.16. s. 3. *Carr v. Burdiss*, 5 Tyrw. 309. See *Cumming v. Bailey*, 6 Bing. 363.

See FRAUDULENT PREFERENCE.—  
LIEN, 11.—VOLUNTARY ASSIGNMENTS AND CONVEYANCES.

#### *Evidence.*

14. A trader in embarrassed circumstances absented himself from

his house from the 16th of February to the 9th of March. Upon an issue whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th of January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence. *Smith v. Cramer*, 1 Bing. (N.S.) 585. S.C. 1 Scott, 541.

15. Where a trader whose goods are under seizure quits his home, it is for the jury to say whether he departs with the bonâ fide intention to endeavour to procure the means of removing the execution, or whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyse*, 4 Moore & Scott, 552.

#### *Time.*

16. Primâ facie, the act of bankruptcy is presumed to have been committed the day the fiat bears date. *Ody v. Cookney*, 1 Tyrw. & Grainger, 536.

### ACTIONS BY AND AGAINST ASSIGNEES.

1. Assignees of a bankrupt may sue in the debet as well as the detinet, though executors cannot. *Fergusson v. Mitchell*, 1 Tyrw. & Grainger, 179.

2. A landlord being in possession of the premises lately held by his insolvent tenant, in which were fixtures belonging to the latter, agreed to give up possession, on his assignees paying 7*l.* for the rent then due. They entered, and sold the fixtures, but no occupation by them was proved: Held, that the 7*l.* could not be recovered on a count, stating the defendant's agreement to pay that sum, not being bottomed



## DIGEST.

### ACTIONS BY AND AGAINST ASSIGNEES—*continued.*

on any previous transactions between the parties. *Clarke v. Webb* and another, 4 Tyrwhitt, 673.

3. After L., a trader, had committed a secret act of bankruptcy, M. & Co., his creditors, knowing him to be embarrassed, pressed him for payment, L. said he had no money, but that if they could get a customer for his goods they should be paid. M. & Co. accordingly procured the defendant A., a creditor of their own, to buy goods of L. No money passed from A. to L., or to M. & Co.; but A. gave M. & Co. credit on account. This transaction was communicated to L., and a receipt was given by M. & Co., signed by them, specifying it to be "by payment of defendant A., agreeably to his order, balancing their account with him." A fiat having issued against L., his assignees sued A. in assumpsit for the price of the goods sold to him: Held, if the appropriation of the price to M. & Co. was parcel of the contract between A. and L., and by its terms irrevocable, the action should have been trover, for waiving the tort, and affirming the contract, adopted it in all its parts. *Bradbury v. Anderton*, 5 Tyrw. 152.

4. An execution having issued against a trader, his goods were seized, and sold under it, after he had committed an act of bankruptcy: the assignees having brought trover, Held, that the jury, in assessing the damages, might deduct the expenses of the sale from the proceeds of the goods. *Ex parte Clarke*, 5 Tyrw. 223.

5. Certain wine warrants coming to the possession of the defendant, as the personal representative of

her deceased husband, who died insolvent, she placed them in the hands of her attorney; the warrants being demanded on behalf of the assignees of the husband, the defendant referred the applicant to the attorney: Held, that this was not sufficient evidence of a conversion. *Canot v. Hughes*, 2 Scott, 663.

### *Pleadings, &c.*

6. If assignees of a bankrupt declare in debt, so as to make it sufficiently appear they are so, it is not necessary precisely to allege that they sue "as assignees." *Ferguson v. Mitchell*, 1 Tyrw. & Grainger. 179.

7. The Court allowed the assignees of a bankrupt to plead in covenant on a lease: 1st. That the lessees' interest did not pass to them. 2d. That they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury*, 1 Bing. 326.

8. In pleadings, "possession" is not a sufficient averment of exclusive possession. *Carr v. Burdiss*, 5 Tyrw. 309.

9. The assignees commenced an action of trover, to recover damages for certain goods and chattels in the possession of the bankrupt at the time of his bankruptcy, and since converted by the defendants, who pleaded that before the bankruptcy, the bankrupt assigned the goods to them by deed, and that before the bankruptcy they took possession; the assignees replied the defendants did not take possession before the bankruptcy; issue was joined thereon: Held, the issue was immaterial, as the assignment itself conveyed the property in the goods to the defendants, and the continued possession of the bankrupt amounted to a fraud only. *Carr v. Burdiss*, 5 Tyrw. 309.



## DIGEST.

### ACTIONS BY AND AGAINST ASSIGNEES—*continued.*

10. To a declaration in assumpsit by the assignee of an insolvent debtor for goods sold, &c., the defendant pleaded that he paid a certain sum in full satisfaction and discharge of the promise in the declaration, and that the insolvent accepted and received the same in full satisfaction and discharge. The plaintiff replied, that the defendant did not pay the insolvent the sum mentioned in full satisfaction and discharge, nor did the insolvent accept and receive the same in full satisfaction and discharge: Held good on special demurrer. *Webb v. Weatherby*, 1 Scott, 477.

11. In an action against J. S., he pleaded possession by authority of C. and M., as assignees of a bankrupt; the plaintiff replied, the goods were not the goods of C. and M., as such assignees: Held, this replication admitted the commission and assignment to C. and M., and the only issue was the plaintiff's title. *Jones v. Brown*, 1 Scott, 453. S. C. 1 Bing. (N.S.) 489.

See LIEN, 8. —PLEADING.

#### *Evidence.*

See ACT OF BANKRUPTCY, *Evidence.*  
—SECURITY FOR COSTS.

### ACTIONS AGAINST SHERIFF.

1. Defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them; the plaintiffs accepted the goods without condition: Held, that they could not recover in the action more than nominal damages, at all events not without alleging special damage

in the declaration. *Moon v. Raphael*, 2 Bing. (N. S.) 310.

2. March 5, A. issues a fi. fa. against B. and C., upon a judgment by confession, returnable May 2. May 1, B. and C. pay the debt to the sheriff. B. commits an act of bankruptcy on May 2, and C. on May 5. May 11, a commission issues against B. and C. May 15, A. receives the debt from the sheriff. A. may hold the amount against the assignees of B. and C. *Morland v. Pellatt*, 3 Manning & Ryland, 411.

3. Trover by the assignees of a bankrupt against the sheriff for goods. Plea that R. I. sued out a writ of fi. fa. against the bankrupt, and that it was delivered to the sheriff before the bankruptcy, and that the sheriff seized and sold the goods, and that no docket had been struck against the bankrupt, neither had the sheriff notice of any act of bankruptcy. Replication, that the judgment was obtained against the bankrupt by cognovit in an action commenced by collusion, and that the fiat issued within two months after the seizure. Rejoinder, that the action was commenced adversely: Held, that on these pleadings the plaintiff must begin: Held, that also a cognovit which is filed may be proved by putting in an examined copy, without producing the original, and that the subscribing witness may prove that he saw the party sign a cognovit, of which the paper produced is a copy. *Scott v. Lewis*, 7 Carr & Payne, 347.

See INTERPLEADER ACT.

### ADJUDICATION.

1. On a *prima facie* case against the validity of the fiat, the advertisement of the adjudication was



## DIGEST.

### ADJUDICATION—*continued.*

ordered to be postponed. *Ex parte Lavender*, 4 Dea. & Ch. 486. S. C. 1 Mont. & Ayr. 690.

2. Recommendation to commissioners to hear counsel against the adjudication. *Re Walker*, 2 Mont. & Ayr. 267.

See REVERSING ADJUDICATION.

### ADVANCING PETITIONS.

A petition cannot be advanced till served. *Ex parte Matthew*, 2 Mont. & Ayr. 74.

### ADVERTISEMENT IN GAZETTE.

See STAYING ADVERTISEMENT.

### AFFIDAVITS.

1. It is no objection that an affidavit is sworn before a master in chancery. *Ex parte Hetherington*, 4 Dea. & Ch. 221.

2. An affidavit sworn before the petition is filed cannot be read, but the petition will stand over to have it re-sworn. *Ex parte Taylor*, 2 Mont. & Ayr. 36. Same point, *ex parte Brown*, 3 Dea. & Ch. 496.

3. Though an affidavit alleged to be impertinent is not read, it will be included in the order for costs by the registrar, unless ordered to be excluded at the hearing. *Ex parte Barrington*, 2 Mont. & Ayr. 72.

See CERTIFICATE, 4. 10, 11, 12. 16. 23.—COSTS, 3, 4, 5.—PROOF, 3.—REVERSING ADJUDICATION.—SERVICE, 12, 13.

### AGENT'S LIEN.

See PROPERTY PASSING TO ASSIGNEES, 6, 7, 8.

### ALLOWANCE TO BANKRUPT.

1. After a final dividend meeting under 6 Geo. 4. c. 16. s. 109. the bankrupt is entitled to his percentage or allowance; and that he owes money to the assignees, or they claim a debt from him, makes no difference. *Ex parte Cooper*, 2 Mont. & Ayr. 689.

2. If the bankrupt owes money to the assignees, the Court will order it to be set off against his allowance. *Ex parte Cooper*, 2 Mont. & Ayr. 692.

3. Though the assignees, with the concurrence of the commissioners, have ordered an allowance for maintenance, (under 6 Geo. 4. c. 16. s. 114.) till the bankrupt has passed his last examination, which order remains on the proceedings; yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned sine die, the Court has no power to interfere, either as to the maintenance or the passing of the examination. *Ex parte Hall*, 1 Mont. & Ayr. 450. S. C. 4 Dea. & Ch. 530.

See ASSIGNEES, 11.

### AMENDING FIAT.

See FIAT, *Amending*.

### AMENDING PETITION.

See CERTIFICATE, 10.

### ANNUITY.

See PROOF, 5, 6, 7. 25, 26, 27.

### ANNULLING.

*Practice.*

1. Assignees should not join with a creditor having an interest adverse to the fiat in a petition to annul. *Ex parte Wilks*, 2 Mont. & Ayr. 667.



## DIGEST.

### ANNULLING—*continued.*

2. After a composition not paying 15s. in the pound, a commission issued in 1826, the bankrupt was then allowed to trade and contract new debts; in 1835 a fiat issued against him: Held, the commission of 1826 could not be impounded, to enable the property to be divided under the fiat: that could only be done in case of fraud or contract to allow the bankrupt to trade. *Ex parte Abbott*, 2 Mont. & Ayr. 599.

3. The Court will not annul on the bankrupt's petition, on an arrangement with the petitioning creditor, without evidence of there being no other creditors, or of their consent. *Ex parte Parr*, 1 Dea. 77.

4. When both the quorum commissioners are unable to open the fiat, the proper course is to annul it, and take out a new one. *Ex parte Sutton*, 1 Dea. 43.

5. Where a bankrupt after commencing two actions against the petitioning creditor, and the messenger presents a petition to supersede, the Court will require him to discontinue the actions before it proceeds to hear petition. *Ex parte Pownall*, 3 Dea. & Ch. 723; but see next case, *infra*.

6. Where a bankrupt petitions to annul the fiat on the ground of there being no petitioning creditor's debt, nor any act of bankruptcy, the Court cannot compel him to undertake not to bring an action. *Ex parte Daly*, 3 Dea. & Ch. 728; but see the preceding case, *supra*.

#### *With Consent.*

7. A fiat cannot be annulled with consent of creditors where the bankrupt has not surrendered. *Ex parte Levi*, 2 Mont. & Ayr. 685.—See a long note on this subject in Montagu and Bligh's Reports, Appendix.

8. Annuling, with consent of nine tenths, allowed, though the commissioner's certificate did not state what proportion the creditors assenting bore to those who proved. *Ex parte Hinton*, 2 Mont. & Ayr. 361. S. C. 4 Dea. & Ch. 351.

9. Annuling with consent, where one of the creditors could not be found, allowed, on paying the amount of his debt into Court. *Ex parte Crowther*, 4 Dea. & Ch. 31.

*See JURISDICTION*, 2.

#### *Misdescription.*

10. Where a creditor petitioned to annul a fiat on the ground of the misdescription of the bankrupt without any intention on his part to issue another fiat, and the misdescription was so slight that no creditor was deceived by it, the Court dismissed the petition. *Ex parte Mills*, 3 Dea. & Ch. 606.

#### *Non-prosecution.*

11. Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for annulling the second, that it did not issue until after first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Ex parte Westall*, 4 Dea. & Ch. 350.

12. The Court will not annul a separate fiat to give effect to a subsequent joint fiat, on the ground that the only witness who could prove the act of bankruptcy was kept out of the way, nor allow the proceedings under the separate fiat to be inspected, but will enlarge the time for opening the joint fiat. *Ex parte Burdekin*, 1 Dea. 57.

#### *Who may petition.*

13. A person whose debt is alleged to be usurious cannot petition to annul the fiat for fraud, or stay the certificate. *Ex parte Jarman*,



## DIGEST.

### ANNULLING—*continued.*

2 Mont. & Ayr. 119. S. C. 4 Dea. & Ch. 393.

14. A party who sustains a grievance from a fiat may petition to annul it, notwithstanding he claims adversely to it. A trustee therefore under a trust deed which the fiat would overreach may petition for this purpose. *Ex parte Jones*, 3 Dea. & Ch. 697.

15. A power of attorney to transact any business in the courts of law authorizes the attorney to apply to annul a fiat. *Ex parte Dunstan*, 4 Dea. & Ch. 37.

16. In cases of fraudulent fiats the Court will not dismiss a petition to annul on a preliminary objection that the petitioner is not a creditor. *Ex parte Taylor*, 2 Mont. & Ayr. 37. But see *ex parte Jarman*, 2 Mont. & Ayr. 119.

17. Where a party petitions quâ creditor, an objection to the validity of his debt is not a preliminary objection, although he is bound to prove that he is legally a creditor. *Ex parte Wyatt*, 3 Dea. & Ch. 665.

#### *Time of petitioning.*

18. Although a fiat is concerted for the purpose of defeating an action brought by a creditor against the bankrupt for the recovery of his debt, yet where the creditor proves his debt under the fiat, and lies by for ten months before he presents a petition to annul the fiat, the Court will dismiss the petition. *Ex parte Mills*, 3 Dea. & Ch. 606.

19. When the commissioner appoints two meetings under 1 & 2 W. 4. c. 56. s. 20. the fiat cannot be annulled with consent of the creditors under 6 Geo. 4. c. 16. ss. 113, 134. till after the second meeting.

20. A creditor cannot petition to annul who has lain by twelve

months after the issuing of the fiat without assigning some good reason for the delay. *Ex parte Wyatt*, 3 Dea. & Ch. 665.

#### *Effect of Certificate.*

21. Where a creditor petitions to annul a fiat after the bankrupt has obtained his certificate, there must be a distinct allegation of fraud against the bankrupt in the petition; it is not sufficient to state fraud in the affidavit. *Ex parte Wyatt*, 3 Dea. & Ch. 665.

22. When the certificate has been allowed after a petition presented to annul the fiat, it is no bar to the petition. *Ex parte Harvey*, 2 Mont. & Ayr. 597.

#### *Evidence.*

23. Upon bankrupt's petition to annul, depositions of trading and act of bankruptcy read in Court, so as to give him an opportunity of answering them. *Ex parte Laverder*, 4 Dea. & Ch. 486. S. C. 1 Mont. & Ayr. 699.

24. A petitioner to annul a fiat will not be allowed copies of the depositions before there is an office copy of the affidavit in support of the petition. *Ex parte Matthew*, 2 Mont. & Ayr. 73.

25. Although there be not evidence of the trading on the proceedings the fiat will not be superseded, if the bankrupt admitted to the petitioning creditor that he was a trader. *Ex parte Bailey*, 2 Mont. & Ayr. 86.

*See ACQUIESCENCE.—COSTS, 1, 2.—*  
*LORD CHANCELLOR, 1.—RE-*  
*HEARING, 2.—SERVICE, 2. 7.*

### ANSWERING.

One of several respondents not having been served with a petition, the Court ordered it to be re-answered. *Ex parte Potter*, 1 Dea. 287.



## DIGEST.

### ANTIGUA.

*See* **EQUITABLE MORTGAGE.**

### APPEAL.

An appeal cannot be heard on petition instead of special case, because matters of law and fact are involved and the facts numerous. *Re Maberley*, 2 Mont. & Ayr. 678. S. C. 1 Dea. 75. *Ex parte Britten*, 2 Mont. & Ayr. 687. *Re Butterworth*, *ib. id.*

*See* **COSTS**, 10. 22, 23.

### ASSIGNMENT TO ASSIGNEES.

*See* **ASSIGNEES**, 2.

### ASSIGNMENT OF BOND.

The Court will not order the bond to be assigned without evidence of the amount of damage. In this case a reference was ordered to ascertain that point. *Ex parte Hall*, 2 Mont. & Ayr. 513. S. C. 1 Dea. 348.

### ASSIGNEES.

#### *Accounts of.*

1. A petition after a lapse of time by the executors of the bankrupt to charge the assignees for the default of old assignees does not lie. *Ex parte Richards*, 2 Mont. & Ayr. 75. S. C. 4 Dea. & Ch. 183.

#### *Assignment to.*

2. Under a commission prior to 1 & 2 W. 4. c. 56. s. 56. where an assignee is removed since the act, it is not necessary there should be a new assignment, or that the prior assignment should be vacated. *Smith v. De Tastet*, 4 Dea. & Ch. 360. S. C. 1 Mont. & Ayr. 370.

#### *Audit.*

3. Commissioners cannot open the audited accounts of assignees without permission from the Court

of Review. *Ex parte Benham*, 2 Mont. & Ayr. 272. S. C. 1 Dea. 26.

#### *Biddings by.*

*See* **BIDDINGS**, 2.

#### *Choice.*

4. Where two assignees are chosen, and one refuses to act, a new choice must be ordered. *Ex parte Cattaral*, 1 Dea. 193.

5. In general when commissioners reject a debt in toto they should not adjourn the choice of assignees to enable the petitioner to present a petition to prove. *Ex parte Big-nold*, 2 Mont. & Ayr. 655.

#### *Expenses.*

6. Assignees are entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate. *Ex parte Joyner*, 2 Mont. & Ayr. 1. overruling *ex parte Elsee*, Mont. 1.

7. Assignees are entitled to travelling expenses bonâ fide incurred for the benefit of the estate. *Ex parte Lovegrove*, 2 Mont. & Ayr. 4. S. C. 3 Dea. & Ch. 763.

#### *Injunctions against.*

8. Where assignees have a legal right the Court will restrain them, if they sue against equity. *Ex parte Booth*, 2 Mont. & Ayr. 93. S. C. 4 Dea. & Ch. 211.

#### *Liabilities.*

9. A. as assignee of B., a bankrupt, gave an undertaking to C. who was the mortgagee of one farm, and was under a contract to purchase another farm, (both the property of the bankrupt,) and who had a distress upon the mortgaged premises, that if the distress were withdrawn, he would pay to C. the arrears then due in respect of the mortgage out of the effects on the premises. C. withdrew the distress accordingly, and afterwards the bankruptcy was



## DIGEST.

### ASSIGNEES—*continued.*

annulled before A. had obtained possession of any part of the bankrupt's effects, whereupon C. brought an action on the undertaking, and recovered judgment against A. personally: Held, on a bill filed by A. against C., to which B. was no party, that A. could have no relief in equity against the judgment at law, and that he was not entitled as against C. to claim repayment of the sum thereby recovered out of the price which C. had contracted to pay for the other farm. *Pell v. Stephens*, 2 Mylne & Keen, 334.

10. The solicitor cannot in bankruptcy compel the assignees to pay his bill, if they have no assets. *Ex parte Adams*, 2 Mont. & Ayr. 706. See contra *ex parte Coates*, 1 Mont. & Ayr. 328; *ex parte Lewis*, 3 Dea. & Ch. 618.

11. A. and B. sue out a fiat as solicitors to the petitioning creditor, and the assignees afterwards appoint C. to act as solicitor; but it is agreed between him and A. and B., with the privity of the assignees, that all three shall jointly act as solicitors and share the profits, and the assignees afterwards recognize the acting of A. and B. as such joint solicitors: Held, that this amounted to a retainer by the assignees of A. and B. as joint solicitors with C.; that the Court of Review had jurisdiction on the petition of A. and B. (C. having been served with it) to enforce the payment by the assignees of the solicitor's bill of costs. The assignees are accountable for any money they distribute among the creditors without an order of dividend; and although the bankrupt does not obtain his certificate until after such distribution, yet when he does obtain it

he may petition for an order on the assignees to declare a final dividend to the amount of the sum distributed, with a view to claiming his allowance: and the Court will make a proper order to prevent the bankrupt from being deprived of his allowance to the extent of the sum distributed. *Ex parte Lewis*, 3 Dea. & Ch. 681.

12. Assignees are liable to the solicitor for payment of his bill of costs, whether they have assets or not. *Ex parte Lewis*, 3 Dea. & Ch. 681; and see *ex parte Coates*, 1 Mont. & Ayr. 328.

13. The assignees are not liable to the solicitor for his bill of costs, unless they have assets. *Ex parte Adams*, 2 Mont. & Ayr. 706; but see *ex parte Coates*, 1 Mont. & Ayr. 328; and *ex parte Lewis*, 3 Dea. & Ch. 681.

14. Where the order of a dividend states that a particular assignee is not liable, he will not be included in an order to pay the dividend. *Ex parte Dawson*, 2 Mont. & Ayr. 94.

15. An assignee anticipating that the estate would pay 20s. in the pound, made up that sum to a creditor who had already received 14s. in the pound; the assignee became bankrupt, and the creditor was chosen assignee, and the estate pays no further dividend: Held, he must refund the surplus received. *Ex parte Grimwood*, 1 Dea. 394.

*See DIVIDENDS*, 6.

#### *Purchases by.*

16. If an assignee purchase part of the bankrupt's estate and improve, the estate must be resold and put up at the price given by the assignee, adding the sum laid out in improvements. *Ex parte Hewitt*, 2 Mont. & Ayr. 477. See *ex parte Bennett*, 10 Ves. 400.



## DIGEST.

### ASSIGNEES—continued.

17. Where an assignee purchases part of the estate without leave, the general rule is to remove him. Ex parte *Alexander*, 2 Mont. & Ayr. 492. S. C. 1 Dea. 273.

#### *Removal of.*

18. An assignee who had been guilty of misconduct applied to be discharged on payment of the costs of his application, &c. The Court refused to enter the nature of the misconduct in the order of removal, but made it subject to any future application which might be made against him. Ex parte *Angle*, 4 Dea. & Ch. 118.

19. Where a sole assignee was in insolvent circumstances, and there was some suspicion attached to the debts of the creditors who elected him, an order was made that he should be restrained from acting as assignee, and that one or more persons should be appointed to act in his name, giving him a proper indemnity. Ex parte *Copland*, 3 Dea. & Ch. 561.

See COSTS, 6.—PETITIONS, 3.

#### *Sanction of Court to Arrangements.*

20. The sanction of the Court given to a pecuniary arrangement by the assignees affecting the estate. Ex parte *Prater*, 2 Mont. & Ayr. 364. S. C. 4 Dea. & Ch. 214.

21. Reference to commissioner ordered, whether an arrangement proposed by the assignees was beneficial to the estate. Ex parte *Bradstock*, 2 Mont. & Ayr. 490. S. C. 1 Dea. 272. Ex parte *Kirby*, 2 Mont. & Ayr. 142. S. C. 4. Dea. & Ch. 400. Ex parte *Hyslop*, 2 Mont. & Ayr. 289; ex parte *Prater*, ib. 364; ex parte *Hare*, 2 Clarke & Finelly.

22. The Court will not make any order, on the application of the assignees, as to the management of the estate; they must act on their own responsibility. Ex parte *Belcher*, 4 Dea. & Ch. 1.

See REFERENCES.

#### *Twenty per Cent.*

23. The commissioner cannot charge both assignees with twenty per cent. where only one had the money, unless he finds that the other "knowingly" permitted it. Ex parte *Benham*, 2 Mont. & Ayr. 272. S. C. 1 Dea. 26.

See ACTIONS BY AND AGAINST ASSIGNEES. — COSTS, 6, 7, 8. — ELECTION BY ASSIGNEES.—DIVIDENDS, 4. 6. — PROCEEDINGS.—REFERENCES.

### ATTACHMENT.

1. An attachment for payment of costs is of course after disregard of the four-day order; but, unless ex necessitate, it will not be issued in vacation. Ex parte *Hunt*, 2 Mont. & Ayr. 18. S. C. 4 Dea. & Ch. 503.

2. An order of committal for nonpayment of costs under which the party is committed, will not be suspended on the ground of an appeal, unless the costs are paid into court. Ex parte *Fox*, 2 Mont. & Ayr. 18. S. C. 4 Dea. & Ch. 503.

3. The order of committal after the four-day order must be on petition. Every step towards commitment must be mentioned to the Court. The application to commit must be made on the same day the certificate is made. Ex parte *Myers*, 2 Mont. & Ayr. 87. S. C. 4 Dea. & Ch. 579.

4. In order to ground an attachment for nonpayment of costs pursuant to a rule of Court on the pro-



## DIGEST.

### ATTACHMENT—*continued.*

thonotary's allocatur, there must in all cases be a personal service, unless it appears that the rule or allocatur has been seen in the actual possession of the party. *Dicas v. Warne*, 1 Scott, 537.

See CERTIFICATE, 17, 18.—PROOF, 8.

### ATTESTATION.

If there be four assignees, and a petition to stay the certificate be presented by three, stating themselves to be three of the assignees, but the attestation is bad as to two, the petition may be heard as the petition of one. Ex parte *Burn*, 2 Mont. & Ayr. 483.

### ATTORNEY.

1. Where an attorney has no residence in this country, substituted service at his last place of residence was ordered, of an order nisi for his being struck off the roll. Re *Mark*, 4 Dea. & Ch. 28.

2. The provisions of the 3 Jac. 1. c. 7. s. 1. and 2 Geo. 2. c. 23. s. 23. do not extend to the assignees of an insolvent or bankrupt attorney, who may sue for business done by such attorney without delivering a signed bill to the client. Under 3 Jac. 1. c. 7. a bill signed by the attorney is sufficient, without specifying the Court in which the business was done. Quære, if it is not also sufficient under the 2 Geo. 2. c. 23. s. 23. *Lester v. Lazarus*, 1 Tyrwhitt & Grainger, 129.

See CERTIFICATE, 17, 18.—LIEN, 5, 6.

### AUDIT.

Although the six months have elapsed since the last examination

of the bankrupt the commissioners may appoint an audit meeting. Ex parte *Holyland*, 1 Dea. 367.

See ASSIGNEES, 3.

### AWARD.

In an action by assignees of a bankrupt to recover property of the bankrupt held by the defendants under a claim of lien, whereon a reference is made at Nisi prius of the matters in difference to an arbitrator, he has no authority to award that the defendants have a right to prove against the bankrupt. *Crowfoot v. London Dock Company*, 4 Tyrw. 967. S. C. 4 Cr. & Mee. 637.

### BANKRUPT'S RIGHT TO PROPERTY.

Stock was settled on a wife for her separate use for life, with a power of appointment by will. The trustees, at the request of the husband and wife, sold out the stock and paid the proceeds to the husband, who afterwards became bankrupt. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, and appointed him her executor. He filed a bill of revivor and supplement against the trustees and his assignees, claiming the stock under the appointment, and praying the same relief as his wife might have had; but as he had received the proceeds of the stock sold out, his bill was dismissed. *Nail v. Painter*, 5 Simons, 555.



## DIGEST.

### BARGES.

*See* REPUTED OWNERSHIP, 4.

### BARRISTERS.

*See* COMMISSIONERS, 1.

### BIDDINGS.

*See* OPENING BIDDINGS.

1. The solicitor to the fiat cannot have leave to bid at a sale of the bankrupt's property, unless under very peculiar circumstances. *Ex parte Town*, 2 Mont. & Ayr. 29. S. C. 4 Dea. & Ch. 519.

2. Order refused for an assignee to bid for the bankrupt's property, although the assignee obtained the consent of a meeting of the creditors, such meeting having been only attended by half in value of the creditors. *Ex parte Beaumont*, 3 Dea. & Ch. 549.

3. Although it is the usual and the prudent practice for a mortgagee to apply to the Court for leave to bid, the Court will not rescind the sale where the mortgagee has purchased the property without such leave, if the purchase has been made by him bonâ fide. *Ex parte Ashley*, 3 Dea. & Ch. 510.

4. A mortgagee having bid at the sale of the mortgaged property, and become the purchaser without having previously obtained an order for him to bid, the Court granted him an order nunc pro tunc. *Ex parte Pedder*, 3 Dea. & Ch. 622.

*See* COSTS, 18.—EQUITABLE MORTGAGE, 10.—MORTGAGES, LEGAL.

### BILL BROKING.

*See* TRADER, 2.

### BILL OF COSTS.

An agreement by an assignee to allow the solicitor interest on his

bill of costs does not bind the bankrupt's estate. *Ex parte Phillips*, 1 Dea. 368.

*See* ASSIGNEES, 10.—ATTORNEY, 2. SOLICITOR, 1.

### BILL OF EXCHANGE.

Affidavit for proof on, must state consideration. *Ex parte Maberly*, 2 Mont. & Ayr. 23.

*See* PROOF, 9, 10, 11.

### BOND.

*See* PROOF, 13.

### BREACH OF TRUST.

*See* CERTIFICATE, 2.

### BUILDER.

*See* TRADER, 1.

### CASES.

*Commented upon.*

1. *Ex parte Ellis*, commented on in *ex parte Vere*, 2 Mont. & Ayr. 129.

2. *Ex parte Gould*, 1 Gl. & J. 231, in *ex parte Barrington*, 2 Mont. & Ayr. 251.

*Confirmed.*

3. *Ex parte Barratt*, 1 G. & J. 327, confirmed in *ex parte Dickson*, 4 Dea. & Ch. 622.

4. *Carvalho v. Burn*, 4 Barn. & Adol. 382, confirmed by *Burn v. Carvalho*, 1 Adol. & Ellis.

*Corrected.*

5. *Ex parte Skinner*, Mont. & Bli. 417, corrected by *ex parte Collier*, 4 Dea. & Ch. 520.

*Doubted.*

6. *Robinson v. Macdonnell*, 5 Mau. & Sel. 228, doubted in *Leslie v. Guthrie*, 4 Scott, 683.



## DIGEST.

### CASES—continued.

#### *Over-ruled and reversed.*

7. *Williams v. Stephens*, 2 Camp. 301, is over-ruled by ex parte *Lavender*, 4 Dea. & Ch. 491.

8. Ex parte *Elsee*, Mont. 1, over-ruled by ex parte *Joyner*, 2 Mont. & Ayr. 1.

9. *Munk v. Clarke*, 10 Bing. 102, by *Munk v. Clarke*, 2 Bing. (N. S.) 229.

### CERTIFICATE.

#### *Debts barred.*

1. If a clerk, hired for a year, continue in the bankrupt's office after the bankruptcy, and then, in the middle of the year, by mutual consent, the contract is rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the master's certificate does not bar the clerk from recovering all the wages due from the expiration of the year last before the fiat up to time of rescinding the contract, no part of such wages being proveable: the 6 Geo. 4. c. 16. s. 48. makes no difference. *Thomas v. Williams*, 3 Adol. & Ellis, 684.

2. A. and B. were trustees; A. misapplied the trust funds, and a commission issued against him, under which he obtained his certificate; no proof was made, as he concealed the fact, and continued to pay the interest; afterwards a fiat issued against him, after which the breach of trust was discovered: Held, the certificate under the commission was a bar to any proof under the fiat. Ex parte *Holt*, 2 Mont. & Ayr. 562.

#### *Joint and separate.*

3. Where two bankrupts under a joint fiat obtain a joint certificate

from their creditors, and one of the bankrupts dies before the certificate is allowed, the Court will on motion allow it as the separate certificate of the survivor. Ex parte *Carter*, 3 Dea. & Ch. 549.

#### *Motion for Discharge.*

4. Semble, the affidavit in support of a motion to discharge a defendant on the ground that he has become bankrupt and obtained his certificate must show that the certificate is enrolled, and the rule must be drawn up on reading the enrolment. *Osborne v. Williamson*, 1 Meeson & Welsby, 551.

#### *Petition to stay.*

5. The certificate cannot be stayed for misconduct before the fiat issued. Ex parte *Gordon*, 2 Mont. & Ayr. 30.

6. If there have been two commissions and no dividend, it is in the discretion of the Court to allow or refuse the certificate. Ex parte *Green*, 2 Mont. & Ayr. 31. S. C. 4. Dea. & Ch. 112.

7. A creditor who has not proved, and who takes the bankrupt in execution and petitions to stay the certificate, must elect whether he will abandon the action or the petition. Ex parte *Green*, 2 Mont. & Ayr. 31. S. C. 4 Dea. & Ch. 112.

8. That the bankrupt has not fully disclosed his estate is not sufficient in ordinary cases to stay the certificate. Ex parte *Burn*, 2 Mont. & Ayr. 483.

9. That the bankrupt has not given up some of his property is no ground to stay the certificate. Ex parte *Burn*, 2 Mont. & Ayr. 483.

10. If the allegation in a petition to stay the certificate is positive, while the affidavit in support by the petitioner states information and belief only, but another affidavit in



## DIGEST.

### CERTIFICATE—*continued.*

support by a third person states the fact positively, it is sufficient. *Ex parte Fife*, 2 Mont. & Ayr. 575. S. C. 1 Dea. 418.

11. The certificate will be stayed in a petition alleging information and belief, if supported by an affidavit swearing to the fact positively. Sir J. Cross, diss. The certificate will be stayed to enable a creditor to prove when the reason for his not proving was a belief that no dividend would be paid. *Ex parte Perring*, 2 Mont. & Ayr. 486. S. C. 1 Dea. 266.

12. On petition to stay certificate it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient. If it merely so appear from the affidavits in support, that is insufficient, and no amendment of petition to stay certificate allowed. A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts; à fortiori not to stay certificate. On petition to prove and stay certificate it is not necessary to charge directly what debt was tendered for proof to the commissioner or when it was rejected. *Ex parte Robinson*, 4 Dea. & Ch. 499.

13. On a petition for leave to prove and stay the bankrupt's certificate the Court will, where the circumstances are suspicious, direct a meeting to enable the creditor to prove, and order the commissioners to review the certificate. *Ex parte Bray*, 3 Dea. & Ch. 495.

14. An allegation that the bankrupt has not fully disclosed his estate is not sufficient in ordinary cases to stay the certificate. In extreme cases the Court would order

first an issue. *Ex parte Burn*, 2 Mont. & Ayr. 483. S. C. 1 Dea. 194.

15. A creditor who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if his (the creditor's) assignees do not interfere. *Ex parte Taylor*, 4 Dea. & Ch. 125.

16. Where, on petition to stay certificate, petitioner does not appear, and petition is dismissed, certificate not ordered to go without the production of an affidavit that there is no collusion. *Ex parte Hetherington*, 4 Dea. & Ch. 224.

*See* ANNULING, 13. 21, 22.—  
ATTESTATION.—REHEARING, 2.

#### *Its protection.*

17. A solicitor's certificate does not protect him from attachment for contempt in not paying into Court money belonging to his client, and fraudently retained. *Re Newbury*, 5 Nev. & Man. 419. In re *Bonner*, 1 Nev. & Man. 555. S. C. 4 Barn. & Adol. 811.

18. Whether the certificate would have exempted him from attachment if no fraud. *Quære*, ib. id.

19. Bankrupt having obtained his certificate is no longer privileged as to costs. *Ex parte Lomas*, 4 Dea. & Ch. 258.

#### *Under second fiat.*

20. The 127th section of 6 Geo. 4. c. 16. does not apply where the second commission was before the 6 Geo. 4. The bankrupt was insolvent in 1818 and a commission issued in 1832, under which he obtained his certificate previous to 6 Geo. 4. c. 16.: Held, the interest in an agreement entered into by the bankrupt subsequently to the certificate did not pass to the assignees under the commission. *Ex parte Hawley*, 2 Mont. & Ayr. 426.



## DIGEST.

### CERTIFICATE—*continued.*

#### *Signature.*

21. If a fiat be worked before one commissioner, and in his absence from London in vacation the certificate be signed by another commissioner who acts for the absent commissioner, the Court will refer the certificate back to be signed by the commissioner who had been absent. *Ex parte Burn*, 2 Mont. & Ayr. 483.

22. Omission of year in date to signature of certificate by creditor, where the date was properly attached to preceding signature, rectified. Officer ordered to pass such certificates in future without putting parties to expense of petition. *In re Buckley and Trueman*, 4 Dea. & Ch. 504.

23. Special order as to allowance of a certificate, where one of the signatures was by the power of attorney, the signature to which by affidavit was not properly verified. *Ex parte Dunstan*, 4 Dea. & Ch. 30.

#### CHECKS.

*See* PROOF, 14 to 19.

#### CHOICE OF ASSIGNEES.

*See* ASSIGNEES, 4, 5.

#### CLAIMS.

1. Where a sum has been ordered to be paid into Court by the bankrupt in a suit in Chancery still pending against him, a claim was ordered to be entered on the proceedings for that amount, and the assignees were directed to reserve dividends on that sum, to be paid to the accountant general to the credit of the suit in Chancery. *Ex parte Farden*, 3 Dea. & Ch. 479.

2. Where the bankrupt had been ordered to pay a sum into Court in a suit in Chancery against him pending at the time of his bankruptcy, it was ordered by the Court of Review that a claim should be entered for that sum on behalf of the plaintiff in the suit, and that the dividends on that sum should be paid into the Court of Chancery, and invested in the name of the accountant general. *Ex parte Hancock*, 3 Dea. & Ch. 523.

3. Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim for the amount till the question is determined. *Ex parte Williams*, 4 Dea. & Ch. 180.

#### CLERKS.

A clerk compelled to leave the bankrupt's service several months before the bankruptcy, on account of his master's inability to pay his salary, is entitled to six months' wages in full. *Ex parte Sandes*, 2 Mont. & Ayr. 684.

*See* CERTIFICATE, 1.—PROOF, 20.

#### COACH PROPRIETOR.

A coach proprietor is not a trader, *semble*. *Re Walker*, 2 Mont. & Ayr. 267.

#### COAL BARGES.

*See* REPUTED OWNERSHIP, 4.

#### COMMISSIONERS.

1. A barrister cannot petition to have his name inserted in a commission. *Ex parte Douglass*, 2 Mont. & Ayr. 219.

2. The quorum Commissioners named in a fiat are entitled to be summoned: if not summoned, the



## DIGEST.

### COMMISSIONERS—*continued.*

Court will interfere, and can declare every thing void, done under the fiat in their absence. Ex parte *Williams*, 2 Mont. & Ayr. 616.

3. The quorum Commissioners named in a fiat are entitled to be summoned: if not summoned, the Court of Review will interfere. Ex parte *Douglass*, 2 Mont. & Ayr. 218.

4. A commissioner of bankruptcy appointed under the 1 & 2 W. 4. c. 56. has no power, when sitting alone, under the authority of the 7th section to fine or commit for a contempt. *The King v. Faulkner*, 2 Crompt., Mee., & Ros. 525. S. C. 2 Mont. & Ayr. 311.

See COSTS, 9.—FEES.—JURISDICTION, 2, 3, 4.—WARRANT, 2, 3.

### COMMITMENT.

1. A bankrupt having been committed by one of the London Commissioners to the custody of the messenger for not answering satisfactorily was brought up before two commissioners, and committed by them to Newgate: Held, that the commitment was illegal, inasmuch as the bankrupt ought to have been brought up and re-examined before a subdivision court consisting of three commissioners, who must be all present at such examination, though they need not be unanimous in the sentence of commitment. Ex parte *Lampon*, 3 Dea. & Ch. 751.

2. To justify a committal of a bankrupt for not answering satisfactorily, the commissioners should point out the unsatisfactory answers, and press those points. Ex parte *Lee*, 2 Mont. & Ayr. 15.

See ATTACHMENT.—JURISDICTION, 3.

VOL. II.

### COMPOSITION.

See PROOF, 21 to 24.

### COMPOUNDING PETITIONING CREDITOR'S DEBT.

Where the bankrupt accepted and gave the petitioning creditor a bill of exchange, in consideration of abandoning the fiat, which was done before the adjudication, the plaintiff cannot recover thereon, as being illegal and void by the general policy of the law, independently of 6 Geo. 4. c. 16. s. 8. *Davis v. Holding*, 1 Tyrw. & Graing. 371. S. C. 3 Crompt., Mee., & Ros. 159. See also ex parte *Thompson*, 1 Ves. jun. 157; *Jackson v. Duchaire*, 3 Ter. Rep. 551; *Cockshott v. Bennett*, 3 Ter. Rep. 763; and *Leicester v. Rose*, 4 East, 372.

### CONDITIONS AS TO BANKRUPTCY.

A trader on his marriage received a fortune of 5,000*l.* with his wife, and settled a sum of stock in trust for himself for life, with limitations over for the benefit of his wife and children, in the event of his becoming bankrupt or insolvent; and it was provided, that if he should survive his wife, and the issue of the marriage should fail, and he should then be or should have been a bankrupt, fifteen sixty-sixths of the stock should belong to the wife's next of kin in blood. No part of the 5,000*l.* was settled, but the whole of the settled fund was the husband's property, and it did not appear from any of the expressions in the settlement what was the consideration for the provision as to fifteen sixty-sixths of the stock. Held, that the limitations over, in the event of the bankruptcy of the husband, were good as to the



## DIGEST.

### CONDITIONS AS TO BANKRUPTCY—*continued.*

fifteen sixty-sixths of the trust fund, that being the proportion of the trust fund which the wife's fortune would have purchased, but were void as to the remainder. *Lester v. Garland*, 5 Simon, 205.

See PROPERTY UNDER RESTRAINT OF ALIENATION, 2.

### CONSENT OF CREDITORS.

See ANNULING, 7, 8, 9.—SUITS, 3.

### CONSEQUENCES OF BANKRUPTCY.

See CERTIFICATE.

### CONSIDERATION.

See BILL OF EXCHANGE.

### CONSOLIDATION.

A joint and several creditor proved his debt under two separate estates, after which the joint and separate estates were consolidated: Held, that the creditor is nevertheless entitled to retain both his proofs. *Ex parte Fuller*, 3 Dea. & Ch. 520.

See SERVICE, 5.

### CONSTRUCTION OF STATUTES.

6 Geo. 4. c. 16. s. 48. as to servants, &c. entitled to full payment. *Thomas v. Williams*, 1 Adol. & Ellis, 685.

### CONTEMPLATION OF BANKRUPTCY.

Contemplation of bankruptcy.—The meaning of these words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which

takes place under a commission. Per Park, J. *Morgan v. Brundrett*, 5 Barn. & Adol. 296.

See INSOLVENCY.—VOLUNTARY ASSIGNMENTS AND CONVEYANCES, 1. 3. 7.

### CONTEMPT.

See ATTACHMENT.—COMMISSIONERS, 4.

### CONTINGENT ANNUITY.

See PROOF, 25, 26, 27.

### CONVEYANCES BY BANKRUPT.

In 1818 A. conveys Blackacre to B. B. becomes bankrupt, and his assignee conveys in 1813 to C. In 1824 A. conveys Blackacre to D. It is competent to D., in an ejectment brought against him by C., to shew that in 1818 A. had no legal estate in Blackacre. *Doe v. Powell*, 3 Nev. & Man. 618.

### COPIES OF THE DEPOSITIONS.

It is not of course on a petition to reverse the adjudication to grant copies of the depositions before the hearing. Without an affidavit that there is no collusion, copies will not be granted before the hearing. *Ex parte Mathew*, 2 Mont. & Ayr. 74. See ANNULING, 23, 24, 25.—REVERSING ADJUDICATION, 2, 3, 4, 5.

### COSTS.

*Annuling.*

1. Where the bankrupt knows he has committed an act of bankruptcy, his petition to annul will be dismissed with costs. *Ex parte Thompson*, 2 Mont. & Ayr. 41. S.C. 4 Dea. & Ch. 534.



## DIGEST.

### COSTS—continued.

2. Costs ordered to be paid by the bankrupt of a reference taken by him upon his petition to annul for want of requisites. *Ex parte Neirincks*, 2 Mont. & Ayr. 542.

#### *Affidavits.*

3. When a petition is dismissed with costs, the Court will not limit the payment of the costs merely as to the affidavits that were read on the hearing of the petition, for in general all affidavits filed are entered as read. *Ex parte Lucas*, 3 Dea. & Ch. 664.

4. All affidavits filed are considered as read, on the subject of costs. *Ex parte Barrington*, 2 Mont. & Ayr. 72.

5. All affidavits filed, though not read, are included in an order for costs. *Ex parte Sidebotham*, 4 Dea. & Ch. 141.

#### *Assignees.*

6. On a petition by an assignee for his removal, admitting misconduct, he cannot be ordered to pay costs incurred by such misconduct without a cross petition. *Ex parte Angle*, 2 Mont. & Ayr. 38.

7. In a foreclosure suit, in which the provisional assignee of the Insolvent Debtors' Court is made a party, he representing the owner of the equity of redemption, his costs are paid by the plaintiff, who may add them, with his own costs, to the sum due on mortgage. *Peake v. Gibbon*, 2 Russ. & Myl. 355.

8. In a foreclosure suit against an insolvent mortgagor and the provisional assignee of the Insolvent Court, who claims no interest, the plaintiff must pay the costs of the assignee, and add them to his debt. *Weaving v. Count*, 6 Simon, 439.

#### *Costs against Commissioners.*

9. Quære, as to the jurisdiction of the Court to order a commissioner to pay costs of a new meeting, necessary by his default in not attending. *Ex parte Hall*, 2 Mont. & Ayr. 677.

#### *Costs of Petition against Decision of Commissioners.*

10. Costs are given, when justice requires it, on an appeal from the commissioners. *Ex parte Brookes*, 2 Mont. & Ayr. 78. S. C. 4 Dea. & Ch. 209.

11. The commissioners having improperly rejected a proof, because the claim was merged in a felony, the petitioner was allowed costs out of the estate. *Ex parte Jones*, 2 Mont. & Ayr. 208.

12. The rule of not allowing costs to a party appealing against the judgment of the commissioners will be relaxed in favour of a petitioner establishing a clear and indisputable right of proof, which the commissioners had rejected. *Ex parte Hooper*, 3 Dea. & Ch. 655.

13. Where, after the rejection of a proof by the commissioners, the creditor on petition succeeds in establishing his debt by the affidavits of witnesses, who were not tendered to the commissioners for examination, he pays his own costs. *Ex parte Price*, 3 Dea. & Ch. 489.

14. Where bills of exchange proved under a fiat have been lost by the creditor, and he therefore cannot produce them for the purpose of receiving his dividends, and an application to this Court becomes necessary to receive them, the creditor must pay the costs of the application. *Ex parte Trust*, 3 Dea. & Ch. 750.

15. A., B., C., and D. contract a debt with W. for goods supplied to



## DIGEST.

### COSTS—*continued.*

them on their joint account; A., B., and C. become bankrupt, and W. proves the amount of his debt under their commission, stating in his deposition that A., B., and C. only (without noticing D.) were jointly indebted to him, but he afterwards sues and recovers the amount of his debt against D., the solvent partner: Held, that in consequence of the informality of his proof, W. must pay the costs of the application of the assignee to expunge it. *Ex parte Adams*, 3 Dea. & Ch. 623.

#### *Of Day.*

16. Petition in paper of day. Motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but petition not being called on, without costs of the day. *Ex parte Story*, 4 Dea. & Ch. 504.

17. Where the respondent takes a formal objection to a petition for want of parties, and the petition is for this cause ordered to stand over, the costs of the day are in the discretion of the Court. *Ex parte Thompson*, 3 Dea. & Ch. 612.

#### *Equitable Mortgage.*

18. On the usual petition of an equitable mortgagee for a sale, and leave to bid, the costs come out of the estate, though the assignees do not consent; secus on an independent petition to bid alone. *Ex parte Berkeley*, 2 Mont. & Ayr. 54. S. C. 4 Dea. & Ch. 572.

*See* EQUITABLE MORTGAGE.

#### *Petitioning Creditor.*

19. Although the money first received under a fiat is by the statute required to be appropriated in

discharge of the expenses incurred by the petitioning creditor, yet, where he assents to a different appropriation, he is estopped from afterwards contending that the directions of the act have not been complied with. *Hornridge v. Eyland*, 2 Scott, 357.

*See* PETITIONING CREDITOR, 4, 5, 6, 7.

#### *Scandal.*

20. In cases of scandal the costs are as between solicitor and client. *Ex parte Porter*, 2 Mont. & Ayr. 223.

#### *Set-off.*

21. Costs ordered against bankrupt to be set-off against those ordered in his favour. *Ex parte Hawley*, 4 Dea. & Ch. 572.

#### *Special Case.*

22. The Court intimated to a Master in Chancery that he might allow the costs of preparing a special case, as part of the costs of an appeal given by the Lord Chancellor. *Ex parte Richards*, 2 Mont. & Ayr. 59.

23. Costs of preparing a special case form part of the costs of appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. This Court intimated its opinion to that effect accordingly to such officer. *Ex parte Hawley*, 4 Dea. & Ch. 572.

#### *Surrender.*

24. On a petition to surrender, where there is no wilful default, costs come out of the estate. *Ex parte Smith*, 2 Mont. & Ayr. 382.

#### *Taxation.*

25. An order was made for the taxation of four several bills of a solicitor, for various business done for the same assignee, under which more than a sixth part was taken



## DIGEST.

### COSTS—*continued.*

off the gross amount of the four bills, but not off the amount of any one of the bills: Held, that as all the bills were incurred by the same person in the same right, there was no need for a separate order of taxation for each bill, and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of the taxation. Ex parte *Barratt*, 3 Dea. & Ch. 731.

#### *Prayer for.*

26. Costs are given, in cases of fraud, whether prayed or not. Ex parte *Taylor*, 4 Dea. & Ch. 125.

See ATTACHMENT.—CERTIFICATE, 19.—INTERPLEADER ACT, 2.—PRACTICE, 2.—TAXATION, 14 to 18.

### CROSS PETITION.

See COSTS, 6.

### DEBTS BARRED.

See CERTIFICATE, 1, 2.

### DEBT PROVEABLE.

1. A party was outlawed in an action for debt, after judgment; he subsequently petitioned the Insolvent Debtors' Court, and was discharged under the act; the debt on which he was outlawed was included in his schedule: Held, not entitled to be discharged from the outlawry. *Dickson v. Baker*, 1 Adol. & Ellis, 853.

2. Under the 9 Geo. 4. c. 14. s. 1. an acknowledgment, signed by an agent of the debtor, will not retrieve a debt barred by the statute of limitations; it must be signed by the debtor himself. *Hyde v. Johnson*, 2 Bing. (N. S.) 777.

See PROOF, 52, 53, 54.

### DECLARATION OF TRUST.

See REPUTED OWNERSHIP, 31, 32.

### DEPOSIT.

See EQUITABLE MORTGAGE, 10.

### DEPOSITIONS.

See EVIDENCE, 11, 12.

### DISHONOUR OF BILL.

See PROOF, 10.

### DIVIDENDS.

1. Where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as security, and some of the bills were afterwards paid in full: Held, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt. Ex parte *Brunskill*, 4 Dea. & Ch. 442.

2. A creditor executed a power of attorney to A. B., to receive the debt for the use of the bankrupt, who was uncertificated, the latter undertaking to pay the debts in full, and for that purpose giving the creditor a bill of exchange, which was never paid. A second commission issued against the bankrupt, the assignees under which claimed the dividends receivable under the first commission under the power of attorney: Held, the power being revocable, and the consideration failing, the creditor was entitled to the dividends. Ex parte *Smither*, 1 Dea. 413.

3. B. & Co., being largely indebted to R. & Co., indorse to them various bills, which had been drawn or indorsed by C. & Co. for the accommodation of B. & Co. B. & Co. and



## DIGEST.

### DIVIDENDS—*continued.*

C. & Co. respectively become bankrupt, and R. & Co. prove the bills under each commission: Held, that the estate of C. & Co. was a security to make good the amount of principal and interest due to R. & Co. from B. & Co., and that R. & Co. were entitled to receive dividends on their proof under C. & Co.'s commission, until not only the balance due of the principal sum due from B. & Co., but also all interest thereon, was fully satisfied. *Ex parte Reed*, 3 Dea. & Ch. 481.

4. When the amount of a dividend is set apart under 1 & 2 W. 4. c. 56. s. 31., and invested, and the proof is subsequently allowed, the creditor is not entitled to interest. *Ex parte Lewis*, 2 Mont. & Ayr. 671.

5. Where a party purchases of a creditor all his right to the dividends and interest, *semble*, he cannot recover the dividends on petition, but must go to law. *Ex parte Richards*, 4 Dea. & Ch. 190.

6. On dividend being withheld, assignees ordered to pay it, with five per cent. interest from time of application to them for payment. *Ex parte Story*, 4 Dea. & Ch. 504.

7. A person, before *ex parte* Moulton was decided, made a double proof, to which, according to that case, he was not entitled. After seven years the Court will not order the dividends to be refunded, but made a prospective order. *Ex parte Soper*, Ch. 569.

2 Mont. & Ayr. 55. S. C. 4 Dea. &

8. If the solicitor to the fiat have dividends in his hands, received from the assignees under a pretended authority from the creditor, the Court has jurisdiction to order him to pay them over to the cre-

ditor. *Ex parte Story*, 2 Mont. & Ayr. 54. S. C. 4 Dea. & Ch. 504.

*See* ASSIGNEES, 11. 14, 15.—CERTIFICATE, 6.—COSTS, 14.—INTEREST, 3.—JURISDICTION, 6.

### DOUBLE PROOF.

*See* DIVIDENDS, 7.

### ELECTION.

The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant. The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 59th section of 6 Geo. 4. c. 16. *Eicke v. Nokes*, 4 Moore & Scott, 587.

### ELECTION BY ASSIGNEES.

1. A coachmaker who was tenant from year to year of certain premises, and had several coaches on hire, became a bankrupt, and his assignees entered upon the premises to keep the coaches in repair in pursuance of the bankrupt's contracts; in August the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following: In an action by the landlord for a quarter's rent due the Christmas following, Held, that the assignees were liable. *Ansell v. Robson*, 2 Crompt. & Jer. 610.

2. A covenant by A. with B. that he will procure C. to grant a lease to B. is within 6 Geo. 4. c. 16. s. 75., and the assignees must elect. *Ex parte Benecke*, 2 Mont. & Ayr. 692. S. C. 1 Dea. 186.

3. An order was obtained, and served on an assignee, to elect as to an agreement for a loan; he took



## DIGEST.

### ELECTION BY ASSIGNEES— *continued.*

no notice of the order; he was ordered to deliver up possession. Ex parte *Blandy*, 1 Dea. 286.

See LIEN, 4.

### EMBRACERY.

Quære, Whether a conveyance by assignees of a bankrupt, where neither bankrupt nor assignees have been in possession within a year, amounts to embracery. *Doe v. Powell*, 3 Nev. & Mann. 616.

### ENFORCING ORDER.

See ATTACHMENT.

### ENLARGING TIME FOR OPENING.

See ANNULING, 8. 11.

### ENTAILS.

The common bargain and sale from the commissioners to the assignees passes an estate tail of which the bankrupt was seised at the time of his bankruptcy. Quære, therefore, where the bankrupt was seised of an estate tail, which he represented as an estate in fee simple, and died before the estate was sold under his commission, whether there is any necessity for the commissioners executing a special conveyance to the purchaser, and what would be the effect of such a conveyance thus executed after the death of the bankrupt. Ex parte *Somervill*, 3 Dea. & Ch. 668. S. C. 1 Mont. & Ayr. 408.

### EQUITABLE MORTGAGE.

1. The Court will only interfere to order the sale of equitable mortgages in cases where there is no

dispute. Legal mortgage of equitable estate within Lord Loughborough's order. Ex parte *Attwood*, 2 Mont. & Ayr. 24.

2. The Court will not order sale of an equitable mortgage in a suspicious case. Ex parte *Nunn*, 1 Dea. 393.

3. Where partnership accounts must be taken, the usual order for sale of an equitable mortgage cannot be made. Ex parte *Broadbent*, 4 Dea. & Ch. 3.

4. A mortgage given on the eve of bankruptcy for a very old debt is so suspicious that the Court will not interfere. Ex parte *Dewdney*, 2 Mont. & Ayr. 72. S. C. 4 Dea. & Ch. 181.

5. Where a vendee indorses a bill of lading to a third person as security for money advanced thereon, this is a mortgage in equity. Re *Westzinthus*, 5 Barn. & Adol. 817.

6. A bankrupt having a mortgage term deposits the mortgage with a party by way of equitable mortgage, and afterwards purchases the equity of redemption: Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. Ex parte *Tuffnell*, 4 Dea. & Ch. 29.

#### *Costs.*

7. An equitable mortgagee is not entitled to the costs of defending an extent in aid, or to be excused from paying a deposit. Ex parte *Stephens*, 2 Mont. & Ayr. 31.

See COSTS, 18.

#### *Deposit of Deeds.*

8. A deposit of one title deed creates an equitable mortgage where the other deeds are left in the hands of the owner's solicitors, without their having any other equitable mortgage thereon. Ex



## DIGEST.

### EQUITABLE MORTGAGE— *continued.*

parte *Chippendale*, 2 Mont. & Ayr. 299. 1 Dea. 67.

9. Slaves in Antigua cannot be equitably mortgaged by a deposit of a registered title deed, containing a schedule of slaves, if the memorandum accompanying the deposit which is registered does not contain a list of the slaves. Ex parte *Rucker*, 1 Mont. & Ayr. 481. S. C. 3 Dea. & Ch. 704. reversing ex parte *Borrodaile*, 2 Mont. & Ayr. 399.

#### *Deposit on Sale.*

10. Onsale of equitable mortgage, the mortgagee having leave to bid, is not exempted from paying a deposit. Ex parte *Stephens*, 2 Mont. & Ayr. 31.

#### *Interest.*

11. An equitable mortgagee is entitled to compute interest up to the time of taking the account as against his security. Ex parte *Ramsbottom*, 2 Mont. & Ayr. 79. S. C. 4 Dea. & Ch. 426.

12. A debtor who has a deposit of goods for his debt and interest, and who, at the request of the assignees, delays the sale for a better market, and afterwards sells, may apply the proceeds in the reduction of the interest accrued due since the fiat. Ex parte *Kensington*, 2 Mont. & Ayr. 300.

#### *The Memorandum.*

13. Letters sent subsequent to the deposit are sufficient memoranda to entitle to costs on a petition for sale of an equitable mortgage. Ex parte *Reynolds*, 2 Mont. & Ayr. 104. S. C. 4 Dea. & Ch. 278.

14. A memorandum in writing, drawn up entirely by the clerk of

an equitable mortgagee, and which was not signed by the bankrupt, is not sufficient to exempt the mortgagee from paying the costs of the petition for the sale. Ex parte *Emmerton*, 3 Dea. & Ch. 654.

15. In equitable mortgages by deposit of title deeds, without a memorandum, the mortgagee is not entitled to past advances, in opposition to the bankrupt's affidavit. Ex parte *Martin*, 2 Mont. & Ayr. 243.

16. In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances. Ex parte *Martin*, 4 Dea. & Ch. 457; ex parte *Molineux*, 4 Dea. & Ch. 460.

#### *Rents and Profits.*

17. On the sale of equitable mortgage the right to the rent accrues from the date of the order of sale. Ex parte *Bignold*, 2 Mont. & Ayr. 17. S. C. 4 Dea. & Ch. 259.

18. Where (the bankrupt having absconded) an equitable mortgagee enters into possession of the premises, and the assignees afterwards acquiesce in his continuing in possession, he is entitled to the profits before the order of sale and from the time of his entry. Ex parte *Bignold*, 2 Mont. & Ayr. 214.

19. Where there has been an order for sale of an equitable mortgage, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequently to the order of sale, and up to the time of taking the account. Ex parte *Ramsbottom*, 4 Dea. & Ch. 198.

See PROOF, 30.—SOLICITOR, 4.



## DIGEST.

### EVIDENCE.

#### *Act of Bankruptcy.*

See ACT OF BANKRUPTCY, 14, 15.

#### *In Actions.*

1. In all actions by assignees of a bankrupt, which the bankrupt himself might have maintained if no bankruptcy had occurred, the depositions taken before the commissioners are conclusive evidence of the trading, &c., although at the time of the bankruptcy the cause of action may not have been complete. *Kitchener v. Power*, 4 Nev. & Mann. 710. S. C. 3 Adol. & Ellis, 232.

2. And the question, Whether the action is of such a nature, must be decided by a reference to the facts of the case, (which the judge may collect from the opening of the plaintiff's counsel,) and not from a strict reference to cause of action appearing on the record. *Kitchener v. Power*, 4 Nev. & Mann. 710. S. C. 3 Adol. & Ellis, 232.

3. Therefore, where in trover by assignees, the conversion was laid after the bankruptcy, it was held that the plaintiffs were not precluded, by the form of the record, from having the depositions admitted as conclusive evidence. *Kitchener v. Power*, 4 Nev. & Mann. 710. S. C. 3 Adol. & Ellis, 232.

4. The depositions are conclusive evidence under the 92d section of 6 Geo. 4. c. 16., in a case, where the bankrupt might have sued if no bankruptcy had ensued, though the conversion which gave the right of action, took place after the act of bankruptcy. *Fox v. Mahony*, 2 Crompton & Jervis, 325.

5. In actions by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading, &c. was given

pursuant to 6 Geo. 4. c. 16. s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him on *prima facie* evidence, is an admission of the plaintiffs' title to sue as assignees, without the regular proof of the bankruptcy. *Inglis v. Spence*, 5 Tyrw. 8.

6. In trover by a bankrupt against his assignees, to try the validity of the commission, Held, that secondary evidence of the assignment might be given, after proving that it was lost before it was entered of record, as directed by 6 Geo. 4. c. 16. s. 96. and 2 & 3 Will. 4. c. 114. s. 7. Semble, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Giles v. Smith*, 5 Tyrw. 15.

7. The widow and administratrix of an insolvent being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney: Held, not sufficient evidence of a conversion to sustain an action of trover. *Canot v. Hughes*, 2 Bing. (N. S.) 448.

8. In an action of trover against a sheriff, if it appear that the officer's warrant is lost, parol evidence may be given of its contents, with a view of connecting the sheriff with the officer, although it appear that a book is kept at the sheriff's office, in which an entry is made of all warrants granted by the sheriffs, and this book is neither produced nor called for on the part of the plaintiff. *Holland v. Reeves*, 7 Carr & Pay. 36.

9. In trover against the sheriff, the officer who seized being called



## DIGEST.

### EVIDENCE—*continued.*

to prove the warrant, stated, that he entered on a certain day on a warrant in the usual form, but that he had lost the warrant: Held, sufficient to fix the sheriff. *Moore v. Raphael*, 2 Scott, 489.

10. A plea of denial of bankruptcy (under the new rules) does not dispense with the necessity of the notice to dispute required by the 6 Geo. 4. c. 16. s. 90.

#### *Depositions.*

11. Under the bankrupt act 6 Geo. 4 c. 16. s. 92., the depositions taken before the commissioner are evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy in an action of trover brought by the assignees, though the declaration states a conversion in the time of the assignees only, if the cause of action be one for which the bankrupt himself might have sued. *Kitchener v. Power*, 3 Adol. & Ellis, 232.

12. On a petition to annul, the depositions on the proceedings cannot be read in evidence, though notice to read them has been given, unless copies were tendered, ut semble. *Ex parte Thurkill*, 2 Mont. & Ayr. 672.

#### *Examinations.*

13. On a petition by assignees, disputing a creditor's right to a lien, the examination of the bankrupt's clerk taken by commissioners, in the absence of the creditor, is not evidence. *Ex parte Dobson*, 4 Dea. & Ch. 69.

14. The examination of a third party, taken in the absence of the bankrupt, cannot be read against him on his petition to annul. *Ex parte Chambers*, 2 Mont. & Ayr. 440. S. C. 1 Dea. 197.

15. Practice as to reading examinations taken before commissioners. *Ex parte Crosbie*, 2 Mont. & Ayr. 397.

#### *Issues.*

16. On an issue ordered, whether the bankrupt lost 20*l.* on a particular day, evidence cannot be given of gaming on another day. *Ex parte Fife*, 2 Mont. & Ayr. 578.

#### *Lost Fiat.*

*See FIAT*, 9.

#### *Proceedings.*

17. On a petition to reverse the adjudication and annul, the proceedings are not evidence against the bankrupt, unless notice of intent to use them is given, and copies allowed. *Ex parte Goodwin*, 2 Mont. & Ayr. 532.

#### *Solicitor.*

18. In an action by the assignees to recover property alleged to be part of the estate, the solicitor to the fiat cannot be asked the amount of debts due from the bankrupt. *Ody v. Cookney*, 1 Tyr. & Grainger, 528.

19. In an action by assignees to recover property alleged to have formed part of the estate, the answer of the solicitor to the fiat, as to the amount of assets got in, is not evidence. *Ody v. Cookney*, 1 Tyr. & Grainger, 538.

#### *Vivâ voce Examination.*

20. The drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore a deposition in support of the fiat, stating himself therein not to be a creditor: Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor. But being subsequently examined vivâ voce, and admitting the facts, Held, that as he might be called on to pay the



## DIGEST.

### EVIDENCE—*continued.*

bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable. Ex parte *Lavender*, 4 Dea. & Ch. 487. S. C. 1 Mont. & Ayr. 699.

21. In general the Court will not grant a vivâ voce examination after hearing a petition on affidavit; but this rule is not inflexible. The party is not estopped by not applying before the hearing. Ex parte *Thompson*, 2 Mont. & Ayr. 40. S. C. 4 Dea. & Ch. 534.; and see ex parte *Jarman*, 2 Mont. & Ayr. 119.

22. If both parties agree, a vivâ voce examination is of course; if they do not, the party asking must show cause. Ex parte *Dugard*, 2 Mont. & Ayr. 27. S. C. 4 Dea. & Ch. 521.

23. If affidavits have been filed on both sides, the Court will read them in the first instance. If a vivâ voce examination be desired by the petitioner, he should state facts on his petition to show the necessity, and make a preliminary application. Ex parte *Dugard*, 2 Mont. & Ayr. 26.

24. If on a vivâ voce examination witnesses are ordered out of Court, the petitioner, being a witness, has a right to remain in Court. Ex parte *Dugard*, 2 Mont. & Ayr. 84. S. C. 4 Dea. & Ch. 524.

25. Upon primâ facie case against the validity of the fiat, vivâ voce examination ordered, and advertisement of adjudication ordered to be postponed. Ex parte *Lavender*, 4 Dea. & Ch. 486.

See ACTIONS AGAINST SHERIFF, 3.—

HABEAS CORPUS, 2.—JURISDICTION, 4.—RE-HEARING, 2.—SET-OFF, 6, 7.—SUITS, 3.—SUBSTITUTION OF NEW PETITIONING CREDITOR'S DEBT, 2.—TRADER.

### EXAMINATIONS.

Examinations, when evidence.

See EVIDENCE, 13, 14, 15.

### EXECUTORS.

See PROOF, 30.

### EXPENSES OF JOURNEYS.

See ASSIGNEES, 6, 7.

### EXPUNGING PROOF.

1. Expunging a debt not a matter of right, but of expediency, and discretionary. Ex parte *Dickson*, 4 Dea. & Ch. 623.

2. A double proof made more than six years back ordered to be expunged according to ex parte *Moult*; but dividends received on the expunged proof more than six years back cannot be refunded, even though there was no chance of recouping the injured estate out of future dividends from the remaining proof. Ex parte *Soper*, 2 Mont. & Ayr. 55. S. C. 4 Dea. & Ch. 569.

See COSTS, 15.

### EXPUNGING SCANDAL.

See SCANDAL, 3.

### FEEES.

If more than the statutable fees are taken by the commissioners, they are perpetually disqualified from acting under any future fiat. Two travelling fees for attending two meetings on the same day under the same bankruptcy are beyond the fees allowed by the statute. Ex parte *Carter*, 3 Dea. & Ch. 678. See FIAT, 5, 6.—JURISDICTION, 2, 7.

### FELONY.

See PROOF, 31, 32.



## DIGEST.

### FIAT.

#### *Amending.*

1. A fiat will not be amended by altering the date to let in a later act of bankruptcy, unless under special circumstances. *Ex parte Jacobs*, 2 Mont. & Ayr. 102. S. C. 4 Dea. & Ch. 277.

2. Fiat amended by altering the description of the petitioning creditors, to agree with docket papers. *Ex parte Jervis*, 4 Dea. & Ch. 27.

3. Description of bankrupt's parish allowed to be amended. *In re Humphrey*, 4 Dea. & Ch. 484.

#### *Annulling.*

See ANNULLING.

#### *Effect of Fiat.*

4. A fiat against the master does not dissolve the contract of hiring between master and servant. *Thomas v. Williams*, 3 Adol. & Ellis, 685.

#### *Fees.*

5. Quære, Whether the Court of Review has jurisdiction to exempt a party from paying fees for fiat. *Ex parte Osborn*, 2 Mont. & Ayr. 141. S. C. 4 Dea. & Ch. 398.

6. Upon the loss by the petitioning creditor of his evidence to support the fiat, the Court of Review will not, on a petition by another person for another fiat, order him to be exempt from paying the 10*l.* under section 45, and the 20*l.* under section 47. When a country fiat is superseded because the commissioners decline to act, and a new one issues to a London commissioner, this is not a "removed" fiat under 1 & 2 W. 4. c. 56. s. 47., and full fees must be paid. *Ex parte Welman*, 2 Mont. & Ayr. 293.

#### *Filing.*

7. Where a fiat has not been filed the Court will not, on an *ex parte* application of another creditor, order

it to be annulled, but will give leave to issue a new fiat. *Ex parte Gerthwohl*, 4 Dea. & Ch. 48.

#### *Impounding.*

See IMPOUNDING FIAT.

#### *Injunction to stay issuing.*

8. Where a docket is struck improperly for a town fiat, a party applying for a country fiat is not entitled to an *ex parte* injunction to stay issuing the town fiat. *In the matter of Ings*, 2 Mont. & Ayr. 671.

#### *Lost Fiat.*

9. Where a fiat is lost, and a party does not choose to rely on secondary evidence of its existence, the proper course is to issue a fresh fiat, and not a duplicate fiat. *In re Levett*, 3 Dea. & Ch. 567.

#### *New Fiat.*

See OPENING FIAT.

#### *Object of.*

10. It ought to appear that there is some prospect of recovering property by means of the fiat. *Ex parte Taylor*, 4 Dea. & Ch. 125.

#### *Opening.*

See OPENING FIAT.

#### *Partners.*

11. If a fiat issue against one member of a firm, another fiat against another member will be ordered to go to the same commissioners. *Ex parte Blake*, 2 Mont. & Ayr. 481. S. C. 1 Dea. 191.

12. A second fiat issued against one of several partners after a previous fiat against the other partner cannot now be directed to the same commissioners as those named in the first fiat under the 6 Geo. 4. c. 16. s. 17., but must be directed to the new commissioners appointed under the 1 & 2 Will. 4. c. 56. s. 14. *Ex parte Beague*, 3 Dea. & Ch. 747.

See SECOND FIAT.



## DIGEST.

### FILING.

*See FIAT, 7.*

### FINAL DIVIDEND.

*See ALLOWANCE TO BANKRUPT, 1.*

### FINES.

*See COMMISSIONERS, 4.*

### FIXTURES.

*See REPUTED OWNERSHIP, 5, 6, 7.*

### FORECLOSURE.

*See COSTS, 7, 8.*

### FORFEITURE OF PETITIONING CREDITOR'S DEBT.

*See COMPOUNDING, &c.*

### FORM OF PETITION.

*See PETITION, Form.*

### FRAUD.

Costs are given in cases of fraud, though not prayed. *Ex parte Taylor*, 4 Dea. & Ch. 125.

*See ANNULLING, 21.—COSTS, 26.—*

*CERTIFICATE, 18.—PROOF, 31,*

*32.—PROPERTY PASSING TO ASSIGNEES, 9.*

### FRAUDULENT PREFERENCE.

1. The defendant's bankers discounted for B., a customer, two bills, one of which was accepted by L. for B.'s accommodation, and the payment of the other guaranteed by L., due respectively the 8th and 10th of January. On the 3d of January, B., who was in a state of insolvency, went to the defendant's banking-house accompanied by L., and paid in to his account with them a sum sufficient to cover the two bills, and then drew and gave

to L. two cheques for the amount of the bills, which cheques L. handed over to the defendants in satisfaction of the bills. B. committed an act of bankruptcy on the 9th of January: Held, that this was not a fraudulent preference of the defendants so as to entitle the assignees of B. to maintain an action against them for money had and received, the preference, if any, being given to L. *Abbott v. Pomfret*, 1 Scott, 470.

2. Defendant B.'s bankers had discounted for B. a bill payable Jan. 10th, drawn by B., and guaranteed by L. On the 3d of January, B. being in embarrassed circumstances gave L. a cheque on defendants for the amount of the bill; the defendants on receiving the cheque handed the bill over to L. B. became bankrupt January 9th: Held, that his assignees could not sue defendants as having received the amount of the cheque by way of fraudulent preference. *Abbott v. Pomfret*, 1 Bing. (N.S.) 462. S. C. 1 Scott, 470.

3. In an action by assignees of a bankrupt to recover money paid by way of fraudulent preference, and in contemplation of bankruptcy, it must be shown that the party paying contemplated an actual bankruptcy; it is not sufficient to show that he knew himself to be in a state of insolvency. *Atkinson v. Brindall*, 2 Bing. (N.S.) 225. S. C. 2 Scott, 369.

*See ACT OF BANKRUPTCY, 7 to 13.*

### FREIGHT.

To an action by the assignees of a bankrupt, ship owner, for the freight of a voyage to India accruing to him before his bankruptcy, the defendant pleaded that the ship



## DIGEST.

### FREIGHT—*continued.*

owner before his bankruptcy assigned by deed the freight in question to I. in trust to discharge a debt due from the ship owner to I., and to pay the surplus, if any, to the ship owner; that the defendant had notice of such agreement, and that the defendant had notice of such assignment, and that the freight which were not sufficient to discharge the debt had been demanded of him by I.: Held, a good bar to the action. *Leslie v. Guthrie*, 1 Bing. (N.S.) 697.

See PROPERTY PASSING TO ASSIGNEES, 10, 11.—REPUTED OWNERSHIP, 8. 22.

### FULL PAYMENT.

See CERTIFICATE, 1. 17.—CLERKS.  
—CONSTRUCTION OF STATUTES.  
—WAGES.

### GAMING.

See EVIDENCE.—PROOF, 33.

### GAZETTE.

See STAYING ADVERTISEMENT.

### GENERAL ORDERS.

A general order acts as if a particular order in each case. Ex parte *Sidebotham*, 2 Mont. & Ayr. 151.

### GUARANTEE.

See PROOF, 34, 35.

### HABEAS CORPUS.

1. Quære, as to the power of the Court of Review to issue a writ of habeas corpus. Ex parte *Jones*, 2 Mont. & Ayr. 41. S. C. 4 Dea. & Ch. 536.

2. On an application for a bankrupt's discharge by habeas corpus

an affidavit may be read stating circumstances which are not set forth in the warrant of the commissioners. Ex parte *Lampon*, 3 Dea. & Ch. 751.

3. Writ nisi ordered. Ex parte *Lee*, 2 Mont. & Ayr. 15.

### HEARING OF PETITIONS.

Where petitioner files no affidavits in support, but two days before hearing served notice to examine witnesses on respondent, twenty miles from London, Court refused application of respondent to postpone hearing, so as to procure witnesses in answer, till after petitioner's witnesses were examined. Ex parte *Lavender*, 4. Dea. & Ch. 485.

### HIRING.

See CERTIFICATE, 1.—FIAT, 4.

### IMPERTINENCE.

Officer directed to disallow in taxation costs of all affidavits which in his opinion are impertinent. Ex parte *Harvey*, 2 Mont & Ayr. 593.

See AFFIDAVITS, 3.

### IMPOUNDING FIAT.

1. A commission issued against the bankrupt in 1823, under which a creditor, hearing there were no assets, omitted to prove, and the bankrupt did not obtain his certificate. A subsequent fiat issued in 1834; this was impounded; the creditor cannot have it delivered out in order to prove. Ex parte *Martin*, 1 Dea. 44.

2. A separate fiat issued, under which the certificate was laying for confirmation; a joint fiat then issued; the separate fiat was impounded, and the proofs &c. under the separate fiat transferred to the joint fiat. Ex parte *Digby*, 2 Mont. & Ayr. 735. S. C. 1 Dea. 341.



## DIGEST.

### INDEMNITY.

See STOPPAGE IN TRANSITU, 9.

### INFORMATION AND BELIEF.

See CERTIFICATE, 11.

### INJUNCTIONS.

1. Assignees restrained from proceeding in an action, they having the legal but not the equitable title. Ex parte *Booth*, 4 Dea. & Ch. 211. S. C. 2 Mont. & Ayr. 93.

2. It requires a very strong case to restrain a bankrupt from disputing his commission. Ex parte *Chambers*, 2 Mont. & Ayr. 476.

3. Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for twenty-two years, the Court restrained the bankrupt bringing an action against a purchaser. Ex parte *Davy*, 4 Dea. & Ch. 322. S. C. 1 Mont. & Ayr. 283.

4. After acts of acquiescence and dismissal of former petitions by the bankrupt to supersede, the bankrupt restrained from contesting his commission at law. Ex parte *White*, 4 Dea. & Ch. 279. S. C. 2 Mont. & Ayr. 104.

See FIAT, 8. — PROOF, 1. — RESTRAINING.—SET-OFF, 8.

### INROLMENT.

See CERTIFICATE, 4.

### INSOLVENCY.

1. Principles on which to determine the meaning of the word "insolvent," used in 46 Geo. 3. c. 135. s. 1. *De Tastet v. De Tavernier*, 1 Keen, 161.

2. Embarrassment not to be confounded with insolvency. *Ib. id.*

3. Where a man's means of present payment are so crippled, and his embarrassment so great that he cannot proceed with, and carry on his business in the usual course of

trade, he is "insolvent," without reference to the question whether the whole of his property, when converted into money and realized, would pay his debts; and notice of such a state of circumstances is notice of his insolvency. *De Tastet v. De Tavernier*, 1 Keen, 161.

4. In an action by assignees of a bankrupt to recover money paid by way of fraudulent preference, and in contemplation of bankruptcy, it must be shown that the party paying contemplated an actual bankruptcy; it is not sufficient to show he knew himself to be in a state of insolvency. *Atkinson v. Brindall*, 2 Bing. (N. S.) 225.

5. A stipulation that judgment shall not be entered up on a warrant of attorney before a certain day, unless the conusor shall in the meantime have become bankrupt or insolvent, does not oust the conusee from the right to enter up judgment before the day specified if the conusor be in insolvent circumstances, although he may not have become bankrupt or taken the benefit of an insolvent debtors act. *Biddlecomb v. Bond*, 5 Nev. & Mann. 621.

6. Where A. and B. entered into a written agreement, the one to purchase and the other to sell all the salt made at the salt works of B. for fourteen years, but it was provided that bankruptcy or insolvency on the part of A. should terminate the contract: Held, on demurrer, that the word "insolvency" was used in its natural and not in its artificial sense, and that the contract was put an end to by A. being unable to pay his debts although he had not taken the benefit of the insolvent act. *Parker v. Gossage*, 1 Tyrw. & Graing. 105.

See CONTEMPLATION OF BANKRUPTCY.—PROOF, 36.



## DIGEST.

### INTENT.

*See* ACT OF BANKRUPTCY.

### INTEREST.

1. An agreement by an assignee to pay the solicitor to the fiat interest on the amount of his bill of costs does not bind the estate, and cannot be retained out of the surplus. *Ex parte Phillips*, 2 Mont. & Ayr. 527. S. C. 4. Dea. & Ch. 81.

2. Commissioners not to allow interest on the solicitor's bill of costs. *Ex parte Phillips*, 2 Mont. & Ayr. 531.

3. A dividend having been declared twenty-eight years ago, and the amount invested, the creditor was held entitled to the interest which had accumulated. *Ex parte Halford*, 2 Mont. & Ayr. 289.

*See* BILL OF COSTS.—EQUITABLE MORTGAGE, 11, 12.—DIVIDENDS, 3, 4. 6. — UNCLAIMED DIVIDENDS, 3.

### INTERPLEADER ACT.

1. The sheriff cannot apply to the court under the interpleader act unless the goods or money in dispute are actually in his hands. *Scott v. Lewis*, 2 Crompton, Meeson, & Roscoe, 289.

2. The sheriff is not entitled to costs under the interpleader act, unless under very special circumstances. *West v. Rotherham*, 2 Scott, 802.

### ISSUES.

Where an order from Chancery directs "all witnesses" to be examined, and the plaintiff declines to call some, conceiving his case proved, it seems the judge will himself call the others. *Groom v. Chambers*, 2 Mont. & Ayr. 742.

*See* EVIDENCE, 16.—ACT OF BANKRUPTCY, 14, 15.

### JOINT STOCK COMPANIES.

*See* REPUTED OWNERSHIP, 23 to 27.

### JUDGMENTS.

Relief against judgments at law. *Ex parte Chambers*, 2 Mont. & Ayr. 475.

*See* PROPERTY PASSING TO ASSIGNEES, 13.—JURISDICTION, 8.

### JURISDICTION.

#### *Assignees.*

1. When assignees have a legal right the Court will restrain them if they sue against equity. *Ex parte Booth*, 2 Mont. & Ayr. 93. S. C. 4 Dea. & Ch. 211.

*See* ASSIGNEES, 11.

#### *Bankrupt.*

*See* INJUNCTIONS, 2, 3.

#### *Commissioners.*

2. *Semble*, this Court has no jurisdiction to order the commissioner to certify the consent of creditors to annul, especially when he objects because fees payable under 1 & 2 W. 4. c. 56. ss. 45, 46. are not paid. *In re Hawker*, 4 Dea. & Ch. 569.

3 The Court has a general jurisdiction to entertain questions on the legality of commitment by commissioners upon petition, without habeas corpus and without the warrant of commitment being before it, especially where the objections to the committal would not appear on the face of the warrant. *Dubit.* Sir J. Cross, as to the production of the warrant. *Quære*, Whether this Court has any jurisdiction to issue the writ of habeas corpus. *Ex parte Jones*, 2 Mont. & Ayr. 41. S. C. 4 Dea. & Ch. 536.

4. The Court has no jurisdiction to order a commissioner to compel a witness to produce a document which the commissioner thinks he



## DIGEST.

### JURISDICTION—*continued.*

ought not to produce. *Ex parte Groom*, 2 Mont. & Ayr. 143. S. C. 4 Dea. & Ch. 640.

*See* COMMISSIONERS.—Costs, 9.

#### *Creditors.*

5. A creditor proving or claiming only gives the Court jurisdiction as to the proof or claim, and does not enable the Court to order him to deliver up part of the bankrupt's estate in his possession. *Ex parte Dobson*, 4 Dea. & Ch. 69. S. C. 1 Mont. & Ayr. 666.

6. If A. collude with B. to make fraudulent proofs, and A. with C. and A. with D., and a gross sum of costs is incurred by the estate in consequence of such proofs, the Court has not jurisdiction to order A., B., C., and D. to pay such gross sum, it not being proved they colluded inter se. *Ex parte Brand*, 2 Mont. & Ayr. 707. S. C. 1 Dea. 308.

#### *Fees.*

7. Quære, Whether the Court of Review has jurisdiction to exempt a party from paying fees for fiat. *Ex parte Osborn*, 2 Mont. & Ayr. 141.

*See* ALLOWANCE TO BANKRUPT, 3.

#### *Proof.*

*See* PROOF, 37.—PROPERTY PASSING TO ASSIGNEES, 13.

#### *Solicitor.*

8. Assignees, on the representation of the solicitor to the commission that he is authorized to receive as agent, pay over a dividend to such solicitor; it turns out he had no such authority: Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor, Held, that being solicitor to the commission he might be made re-

spondent as well as the assignees, and that a joint order might be made against them all for its payment. *Ex parte Story*, 2 Mont. Ayr. 54. S. C. 4 Dea. & Ch. 504.

*See* DIVIDENDS, 8.

#### *Specific Performance.*

*See* SPECIFIC PERFORMANCE.

#### *Trustees.*

9. The Court has no power to order a trustee who refuses to submit to the jurisdiction to convey an estate to the assignees which was devised to the trustees for the absolute use of the bankrupt's wife. *Ex parte Abbott*, 1 Dea. 339.

### LACHES.

*See* ANNULING, 11. 13. 18. 20.

### LEASES.

*See* ACTIONS BY AND AGAINST ASSIGNEES, 7. — ELECTION BY ASSIGNEES, 2, 3.

### LIABILITIES.

*See* ASSIGNEES, 9 to 15.—STANDING OVER, 1.

### LIEN.

1. Flower accepted bills to enable Cornie to make shipments to Sydney, on an agreement to apply the return proceeds in payment of the bills. On the last shipment Cornie sent notice to Sydney to send the proceeds direct to Flower, and gave the same notice to a partner of the Sydney Houses, who happened to be in London. Before the notice arrived at Sydney the return proceeds were sent off to Cornie, who became bankrupt, and his assignees received them: Held, that Flower was entitled thereto, and that they were not in his reputed ownership.



## DIGEST.

### LIEN—continued.

Ex parte *Flower*, 2 Mont. & Ayr. 224. S. C. 4 Dea. & Ch. 449.

2. F., a merchant at Liverpool, consigned goods to his agent at Bahia in South America for sale, and drew bills to be paid by the agent out of the proceeds. Some bills so drawn, and negotiated by the indorsements of a house in London with whom F. corresponded, were refused acceptance by the agent, whereon F. wrote to his agent to deliver to the agent of the London house the property of his (F.) in the hands of such agent, to cover the amount of the bills which might eventually be paid; before this letter reached Bahia F. became bankrupt, and F.'s agent afterwards delivered the goods ordered as directed: Held, the goods passed to the assignees, there being no legal or equitable assignment of the goods to the London house before bankruptcy. *Burn v. Carvalho*, 1 Adol. & Ellis, confirming *Carvalho v. Burn*, 4 Barn & Adol. 382.

#### Agreements.

3. An agreement, on dissolution of partnership, to assign the partnership property, in consideration of 50*l.* paid, and five bills for 100*l.* each delivered, is not executory, but executed, and the partnership creditors have no lien on the effects assigned. Ex parte *Clarkson*, 2 Mont. & Ayr. 4. S. C. 4 Dea. & Ch. 56.

#### Assignees.

4. The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings, upon the bankrupt paying, as an additional rent, 7*l.* 10*s.* per cent. upon the

amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings: Held, that as both the written and verbal agreements between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. Ex parte *Ladd*, 3 Dea. & Ch. 647.

#### Attorney.

5. A. delivered his deeds to B., to be investigated prior to a mortgage, A. agreeing to pay all expenses; B. delivered them to his attorneys. The negotiation went off: Held, the attorneys had no lien on the deeds against A. for the costs; and that, supposing A. liable to B. for such costs, B. could not communicate his lien to his attorneys. *Pratt v. Vizard*, 5 Barn. & Adol. 808.

6. The lien of an attorney upon a judgment for his costs in the particular suit, by the 93d rule of Hilary term, 2 Will. 4., extends to the taxed costs as between solicitor and client. *Watson v. Maskell*, 1 Scott. 658.

#### General Lien.

7. The defendants were the proprietors of a scribbling and fulling mill, and were employed by H. & Co. (amongst others) to scribble and full wools and cloths, under a stipulation that "all goods on hand



## DIGEST.

### LIEN—continued.

— —  
should be subject to a lien for a general balance." H. & Co. dyed their wools on defendants' premises, and kept there a quantity of oil and dye-woods; the oil being there for the purpose of being used as required by the defendants servants in the process of scribbling, but kept locked up, and delivered out in small quantities by a servant of H. & Co., and the dye-woods to be used by H. & Co. in dyeing the wools in an intermediate stage of the process of scribbling: Held, that the oil and dye-woods were not subject to the lien. *Cumpton v. Haigh*, 2 Scott, 684. S. C. 2 Bing. (N.S.) 449.

#### *Pleading.*

8. In trover for wools, the Court allowed the defendants to plead, 1st, The general issue; 2d, a customer for warehousekeepers to have a general lien upon goods deposited with them for monies expended upon them, and for their general balance, and that the wools were housed with them by one H., who was indebted to them in a general balance; 3d, A general lien against H., as by special agreement; 4th, That H. was enabled by the consignee of the wools to hold himself out as the owner, and deposited them with the defendants, upon the custom set out in the second plea; 5th, That the wools were consigned by the plaintiff to H., as their agent, and that H. employed the defendants to land and house them, and pay the duties, &c., and claiming a lien as in the second plea. *Leuchhart v. Cooper*, 1 Scott, 481.

#### *Possession necessary to give lien.*

9. A person engaged to perform certain works for a dock company,

for which he furnished and placed on the premises, steam engines, railroads, &c.; the company made advances to him, and he referred them to these engines, &c. as security; he became bankrupt before the work was done, whereon the company erased his name from the engines, &c., and took possession of them, which were still laying on their premises: Held, there was sufficient possession to support the lien. *Crowfoot v. London Dock Company*, 4 Tyrw. 967. S. C. 4 Cr. & Mee. 637.

#### *Reputed Ownership.*

10. A., B., and C. being in partnership, A. retired; a balance became due to him, which B. and C. covenanted to pay by instalments, giving a power of re-entry to A. if any instalment were unpaid, and B. and C. were also to re-assign the premises to A. on trusts for sale; then B. retired, and C. alone continued the business; default was made in payment of an instalment; C. became bankrupt, and A. re-entered: Held, a debt originally due to A., B., and C. was not in the reputed ownership of C., and that A. had a lien thereon. *Ex parte Pemberton*, 2 Mont. & Ayr. 548.

#### *Time of.*

11. A person gave another a lien on all machinery and materials at, &c.: Held, not to extend to materials delivered after the act of bankruptcy. *Crowfoot v. London Dock Company*, 4 Cr. & Mee. 437.

#### *Trustees' Lien.*

12. An award, in an action, that trustees shall give up trust deeds, does not deprive them of their lien thereon for trust expenses. *Ex parte Coppard*, 4 Dea. & Ch. 102.



## DIGEST.

### LIEN—*continued.*

#### *Vendors' Lien.*

13. Where real property is devised to trustees on trust for sale, and to pay the produce to the children of the testator, and the children sell the property to one of the executors, in consideration of a sum secured by bills payable by instalments, and as to some shares further secured by an assignment of a policy of insurance, and the executor becomes bankrupt without having paid the bills: Held, the children had a lien on the estates for the sums unpaid. *Ex parte Latey*, in the matter of *Davis*, 2 Mont. & Ayr. 609.

14. Plaintiff sold to I. trees lying on land occupied by B., and I. was to have power of removing them when he pleased; the trees having been marked by the purchaser, the cubical contents of each ascertained, and some of them having been taken away: Held, that the transfer of the whole was complete, and that upon I.'s bankruptcy the plaintiff could not enforce any lien on the trees, notwithstanding they remained on the land of B., and the sum total of the cubical contents had not been ascertained. *Tansley v. Turner*, 2 Bing. 151.

15. If a third party prevents the vendor from delivering the goods to the vendee, by a false representation that he has a lien thereon, he is liable to an action for damages. *Green v. Button*, 1 Tyrw. & Grainger, 118.

16. Quære, Whether a vendor may refuse to deliver to the vendee goods paid for, on notice of lien thereon from a third party. *Green v. Button*, 1 Tyrw. & Grainger, 118.

17. Where A. buys rum of B., and sold again to C., who gives bills

for the price, but delivery orders were refused to be given to C., except as to three puncheons, which he received; C. sells the puncheons to different persons: Held, on the dishonour of the bills, A. had a lien thereon for the purchase money against C. and the subvendees on all rum not delivered to them. *Dixon v. Yates*, 5 Barn. & Adol. 313.

18. Delivery of part operates in law as delivery of the whole only when delivery of part is intended to be delivery of the whole. Per Denman, C. J. *Dixon v. Yates*, 5 Barn. & Adol. 336.

See PROOF, 2.—PROPERTY PASSING TO ASSIGNEES, 6, 7, 8.—REPUTED OWNERSHIP, 27. — TAXATION, 1, 2.

#### LODGING-HOUSE KEEPER.

See TRADER, 3.

#### LONDON COMMISSIONERS.

See COMMISSIONERS, 4.

#### LORD CHANCELLOR.

1. The Lord Chancellor's jurisdiction to annul a fiat still subsists. In re *Chambers*, 2 Mont. & Ayr. 440. S. C. 4 Dea. & Ch. 578.

2. Petition presented to the Lord Chancellor before 1 & 2 W. 4. c. 56. must be transferred by the Lord Chancellor to the Court of Review, before that Court can hear it. In re *Stokes*, 4 Dea. & Ch. 578.

#### LOST FIAT.

See FIAT, 9.

#### MAINTENANCE.

See ALLOWANCE TO BANKRUPT, 3.



## DIGEST.

### MARRIAGE.

See PROOF, 38. 56 to 59.

### MARSHALLING.

Two estates were devised, charged with legacies; the devisee mortgaged both, became bankrupt, and both were sold; the proceeds of one were sufficient to pay legacies and mortgage money, *secus* the other: Held, the legacies should be paid out of the former alone. Ex parte *Hartley*, 2 Mont. & Ayr. 496. S. C. 1 Dea. 288.

### MASTER AND SERVANT.

A fiat does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. *Thomas v. Williams*, 3 Adol. & Ellis, 685.

### MEMORANDUM.

See EQUITABLE MORTGAGE, 13 to 16.

### MERCHANTS' ACCOUNTS.

See PROOF, 39.

### MINUTES.

See VARYING MINUTES.

### MISDESCRIPTION.

See ANNULING, 10.

### MORTGAGES, EQUITABLE.

See EQUITABLE MORTGAGES.

### MORTGAGES, LEGAL.

#### *Bidding.*

1. When a mortgagee with a power of sale applies for leave to bid, he must waive his power of sale. Ex parte *Davis*, 3 Dea. & Ch. 504.

See BIDDING, 3, 4.

#### *Deposit.*

2. If the mortgagee has leave to bid, the Court will not exempt him from paying the deposit. Ex parte *Tatham*, 4 Dea. & Ch. 360. S. C. 1 Mont. & Ayr. 335.

#### *Rents.*

3. If a legal mortgage is ordered to be sold by the commissioners, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenants to pay the rents to him. Ex parte *Living*, 2 Mont. & Ayr. 223. S. C. 1 Dea. 1.

### MOTIONS.

1. Motion to confirm report as to scandal in affidavits is a motion of course. Ex parte *Hetherington*, 4 Dea. & Ch. 223.

2. An order cannot be rescinded on motion. Re *Walker*, 2 Mont. & Ayr. 267.

See PRACTICE, 2.—SCANDAL, 1, 2.

### MULTIFARIOUSNESS.

In bankruptcy the objection of multifariousness is not considered as conclusive. Ex parte *Brown*, 3 Dea. & Ch. 496.

### NEW CHOICE.

See ASSIGNEES, 4.

### NINE TENTHS.

See ANNULING, 8, 9.

### NON-PROSECUTION.

See ANNULING, 11.



## DIGEST.

### NOTICE.

See EVIDENCE, 17.—INSOLVENCY, 3.  
—LIEN, 16.—REPUTED OWNERSHIP, 9 to 20.—SET OFF, 7.

### NOTICE OF DISHONOUR.

See PROOF, 10.

### NUNC PRO TUNC.

See BIDDINGS, 4.

### OFFICIAL ASSIGNEE.

1. The bankrupt disputed the validity of the commission issued in 1824; in 1831, he applied to a commissioner to appoint an official assignee, as well for the purpose of investigating the validity of the petitioning creditor's debt (which he disputed), as for the purpose of taking care of the property of the estate; Clarke was accordingly appointed: Held, the bankrupt having himself put the commissioner in motion did not estop him from suing Clarke for money received by him as assignee. *Munk v. Clarke*, 2 Bing. (N.S.) 229. S. C. 2 Scott, 475. over-ruling *Munk v. Clarke*, 3 Moo. & Sc. 473. S. C. 10 Bing. 102.

2. The Court of Review has jurisdiction to entertain a petition against the allowance made by the commissioner to the official assignee, but the Court will not review the decision of the commissioner as to the quantum of the allowance, unless it appears that he has proceeded on an erroneous principle. Dissent Sir J. Cross. Ex parte *Tiplady*, 3 Dea. & Ch. 571. S. C. 1 Mont. & Ayr. 161.

3. If an official assignee become insolvent, the creditors' assignees will have leave to sue in the names of the registrars on the bond given

by the sureties. Ex parte *Topham*, 2 Mont. & Ayr. 484. S. C. 1 Dea. 192.

4. An official assignee ought not, except under very peculiar circumstances, to present a petition. Anon. 1 Dea. 106.

### OPENING BIDDINGS.

Biddings opened on a sale of mortgaged premises on an advance of 190*l.* on 300*l.* Ex parte *Hutchinson*, 2 Mont. & Ayr. 727.

### OPENING FIAT.

1. Where time for opening a town fiat is nearly run out, Court will not, at instance of petitioning creditor, annul it, and issue a country fiat, for the alleged convenience of creditors. Ex parte *Bell*, 4 Dea. & Ch. 481.

2. Where the quorum commissioners were absent from the first meeting, the Court will appoint another. Ex parte *Hall*, 2 Mont. & Ayr. 294.

3. Where both the quorum commissioners are unable to attend to open the fiat, the Court cannot make an order that the three other commissioners may open it: the proper course is to annul the fiat, and take out a new one. Ex parte *Sutton*, 1 Dea. 42.

4. A fiat omitted to be opened within the time limited by the general order is not for that cause absolutely annulled, but only annulable. What is required to be stated in an affidavit on an application to enlarge the time of opening a fiat. Ex parte *Smith*, 3 Dea. & Ch. 761.

5. Attendance of petitioning creditor dispensed with under the circumstances at the opening of the



## DIGEST.

### OPENING FIAT--continued.

fiat. In the matter of *Bolton*, 3 Dea. & Ch. 688.

6. The same creditor cannot strike another docket before the time for opening has expired. Re *Gerrish*, 2 Mont. & Ayr. 491. S. C. 1 Dea. 278.

7. Unless there are special circumstances the Court will never allow the petitioning creditor to take out a new fiat before the time for opening has elapsed. Ex parte *Jacobs*, 2 Mont. & Ayr. 102.

8. New fiat issued on the petition of the same petitioning creditor before the time for opening had expired, he having been unable to prove an act of bankruptcy before, but one having been since committed. Ex parte *Llewellyn*, 2 Mont. & Ayr. 298.

9. The petitioning creditor after issuing a fiat found he could not support it, on account of his inability to prove the trading. The Court refused to permit another petitioning creditor to issue a second fiat before the time for proceeding in the first was expired. Ex parte *Howes*, 3 Dea. & Ch. 493.

10. Although the petitioning creditor goes abroad after issuing a fiat, the Court will not permit another creditor to issue a second fiat until the time for proceeding in the first has expired. Ex parte *Medley*, 3 Dea. & Ch. 502.

### ORDERS.

Where an application is made to rescind an order for irregularity, the notice of motion should state what it is: quære, whether the application should not be by petition. Re *Walker*, 1 Dea. 88.

See BIDDINGS, 4. — CLAIMS, 1. — GENERAL ORDERS.—EQUITABLE MORTGAGE, 17, 18.—RE-HEARING, 3.

### OUTLAWRY.

See DEBT PROVEABLE, 1.

### PARTNERSHIP.

1. A. and B. dissolved partnership; C., a creditor of the firm, applied to A., who referred him to B.; C. drew, and A. accepted a bill for the amount of C.'s debt, which was dishonoured. B. became a bankrupt: Held, in an action against A. and B., that it was a question for the jury whether C. had agreed to accept B. as his sole debtor. *Thompson v. Percival*, 5 Barn. & Adol. 925.

2. If a firm of three be dissolved by the retirement of one, and after the dissolution, a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable. Ex parte *Liddiard*, 2 Mont. & Ayr. 87.

3. An agreement on dissolution of partnership to assign the partnership property in consideration of 50*l.* paid, and five bills for 100*l.* each delivered, is not executory, but executed. Ex parte *Gibson*, 2 Mont. & Ayr. 4.

See FIAT, 11, 12.—LIEN, 1, 2.—PROOF, 40 to 46.—REPUTED OWNERSHIP, 21.

### PAYMENTS PROTECTED.

1. Where the bankrupt was to complete works for a dock company for a stated sum, which was paid in sums from time to time, and some materials were delivered, after which money was paid, and the party be-



## DIGEST.

### PAYMENTS PROTECTED— *continued.*

came bankrupt: Held, the payments were general advances, and not payments for particular goods in the course of business, under 6 Geo. 4. c. 16. sect. 82. *Crowfoot v. London Dock Company*, 4 Tyrw. 967. S. C. 4 Cr. & Mee. 637.

2. Defendant held a certain deed of lease, on which he had a lien for 300*l.* as attorney of S.; a commission of bankrupt was issued against S. in December 1829; defendant acted as attorney under that commission, and in 1831, after notice of petition to supersede it, he joined with the assignee under the commission in a sale of the lease, and out of the proceeds was paid the 300*l.* due to him from S.: The commission of bankrupt having been superseded in 1832 for want of a sufficient petitioning creditor's debt, and a new commission having issued, Held, that defendant was liable to refund the 300*l.*, in an action for money had and received to the use of the assignees under the second commission, and also money received in 1831 for rent, &c. accruing to S. *Clark v. Gilbert*, 2 Bing. (N S.) 343. S. C. 2 Scott, 521.

### PENALTIES.

1. Forbidding a thing under a penalty, to protect the revenue, does not make void the thing if done, nor prevent an action thereon. *Swan v. The Bank of Scotland*, 2 Mont. & Ayr. 661.

2. If a thing is prohibited for other than revenue purposes, no action lies thereon. *Swan v. The Bank of Scotland*, 2 Mont. & Ayr. 661.

### PETITIONS.

1. Where a party purchases of a creditor all his right to the dividends, semble he cannot recover the dividends on petition, but must go to law. *Ex parte Richards*, 4 Dea. & Ch. 190.

2. An application for the discharge of a person committed by the commissioner for not answering satisfactorily may be by petition. Sir J. Cross dissent. *Ex parte Jones*, 2 Mont. & Ayr. 41.

#### *Form.*

3. A petition for the removal of an assignee without alleging sufficient grounds on the petition, but stating them on the affidavit in support, is bad. *Ex parte Paramore*, 1 Dea. 279.

4. A petition by an uncertificated bankrupt that his assignees may account must allege that there will be a surplus. *Ex parte Ryley*, 4 Dea. & Ch. 50.

5. Costs are given in cases of fraud, though not prayed. *Ex parte Taylor*, 4 Dea. & Ch. 125.

See ANNULING, 21. — CERTIFICATE, 9. 11, 12.—Costs, 20. 26. —TAXATION, 11, 12, 13.

#### *By Official Assignee.*

See OFFICIAL ASSIGNEE, 4.

#### *Service.*

See ADVANCING PETITIONS.

#### *Signature.*

6. A petition by partners to stay the certificate, signed "for self and partners," is enough, though there is no allegation in the petition of the partnership. *Ex parte Fife*, 2 Mont. & Ayr. 577.

#### *Scandal.*

7. It is no objection to an order that a petition contains scandalous



## DIGEST.

### PETITIONS—*continued.*

allegations ; if so, it should be referred for scandal. *Ex parte Wells*, 1 Dea. 67.

See LORD CHANCELLOR, 2.—  
ORDERS.

### PETITIONING CREDITOR.

1. A tender made to the petitioning creditor of the payment of his debt after a docket had been already struck against the bankrupt, although before the fiat was actually issued, is not sufficient to defeat the fiat. *Ex parte Jones*, 3 Dea. & Ch. 697.

2. An agreement between a petitioning creditor who has sued out a fiat in bankruptcy, and the bankrupt, that the former shall abandon the prosecution of the fiat, and that the bankrupt shall accept a bill of exchange for a certain amount, is illegal, even as between the bankrupt and the petitioning creditor, and the bill of exchange accepted by the bankrupt in pursuance of such an agreement is void, and no action can be maintained upon it. *Davis v. Holding*, 3 Crompt., Meeson, & Roscoe, 159. S. C. 1 Tyrw. & Graing. 371.

3. Plaintiff, being liable to defendant for the costs of a nonsuit, issued a fiat against the defendant ; the Court refused to stay defendant's proceedings in the action. *Eiche v. Nokes*, 1 Bing. (N.S.) 69.

#### *His Bill of Costs.*

4. A petitioning creditor is entitled to be repaid out of the estate a sum paid to a creditor to render him a competent witness to support the fiat. *Ex parte Forth*, 2 Mont. & Ayr. 381.

5. Reference to the commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans*, 4 Dea. & Ch. 392.

6. The solicitor to the petitioning creditor may petition that the assignees may pay him the amount of the petitioning creditor's costs. *Ex parte Benson*, 2 Mont. & Ayr. 582.

7. Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs before they have received money under the fiat, he is nevertheless entitled to an inquiry whether any assets have been received by the assignees. *Ex parte Abram*, 4 Dea. & Ch. 401.

See COSTS, *Petitioning Creditor*, 19.  
—TAXATION.

### PETITIONING CREDITOR'S DEBT.

1. Semble, that pending a replevin on a distress for rent, the landlord cannot sue out a fiat in bankruptcy against the tenant, founded on the demand for rent. *Emery v. Mucklow*, 4 Moore & Scott, 263.

2. The bankrupt entered into a deed of composition containing a release ; he afterwards gave a creditor a promissory note for the residue of his debt : Held, nudum pactum, and not a good petitioning creditor's debt. *Ex parte Hall*, 1 Dea. 17. Quære as to this case.

3. Quære, Whether a joint commission against two joint traders with a third, not included in the commission, on a debt due from the two is valid. *Ex parte Chambers*, 2 Mont. & Ayr. 441. S. C. 1 Dea. 107.



## DIGEST.

### PETITIONING CREDITOR'S DEBT—*continued.*

4. If a partner files a bill, and treats a debt as mixed with the partnership, a fiat cannot afterwards be issued on that debt. *Ex parte Gray*, 2 Mont. & Ayr. 283.

5. If a trader take the benefit of the insolvent debtors' act, a creditor whose debt is inserted in the schedule may afterwards issue a fiat on that debt against the trader. *Ex parte Barrington*, 2 Mont. & Ayr. 255. S. C. 1 Dea. 3.

6. Quære, Whether a mortgagee in trust can alone issue a fiat against the mortgagor on the mortgage debt? He can, if the legal validity of the debt has been previously established by an action at law. Per C. J. *Ex parte Gray*, 2 Mont. & Ayr. 283.

### PLEADING.

A defendant cannot plead any matter to a sci. fa. on a judgment which he might have pleaded to the original action; and where to a sci. fa. on a judgment the defendant pleaded the bankruptcy of the plaintiff, but it did not distinctly and affirmatively appear that the bankruptcy had occurred since the judgment in the original action, the plea was held bad on a special demurrer. Quære, Whether it would be good on general demurrer. *Baylis v. Hayward*, 5 Nev. & Mann. 613.

See ACTIONS AGAINST ASSIGNEES, 6 to 11.—LIEN, 8.—REPUTED OWNERSHIP, 19, 20.—SECURITY FOR COSTS, 1.—SET-OFF, 9.

### POLICIES OF INSURANCE.

See REPUTED OWNERSHIP, 9, 10, 11, 13, 14, 17, 23 to 27.—VOLUNTARY ASSIGNMENTS AND CONVEYANCES, 7.

### POWER OF ATTORNEY.

See ANNULING, 15.—DIVIDENDS, 2.

### POWER OF SALE.

See EQUITABLE MORTGAGE.

### PRACTICE.

1. A petitioner claiming a portion of the bankrupt's property has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that the bankrupt has prevaricated in his statements. *Ex parte Collier*, 4 Dea. & Ch. 364.

2. On an abandoned notice of motion the application for costs and affidavit of service may be on a future day. *Ex parte Stone*, 2 Mont. & Ayr. 503.

3. A petition to confirm a report stood in the paper before a petition excepting to it. The counsel for the first petition has a right to begin by stating the facts of his petition before the counsel for the second petition proceeds to state and argue the exceptions. *Ex parte Morley*, 3 Dea. & Ch. 509.

See PROOF, 47, 48.—TAXATION, 19.

### PRAYER OF PETITION.

See COSTS, 26.

### PREFERENCE.

See FRAUDULENT PREFERENCE.—ACT OF BANKRUPTCY, 7 to 13.



## DIGEST.

### PRELIMINARY OBJECTIONS.

That the warrant of commitment is not in Court is not a preliminary objection on a petition for discharge from committal. *Ex parte Jones*, 2 Mont. & Ayr. 41.

*See* ANNULING, 16, 17.—MULTIFARIOUSNESS.

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### PRINCIPAL AND AGENT.

*See* SET-OFF, 10.

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### PRINCIPAL AND SURETY.

Defendant, after he had become bankrupt, was discharged out of custody on a ca. sa. upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the Court refused on summary application to exonerate the sureties. *Duncan v. Sutton*, 1 Bing. (N. S.) 431.

*See* PROOF, 49, 50.

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### PROCEDENDO.

After the fiat has been annulled by the Chancellor, the Court of Review may rehear and issue a procedendo. *Ex parte Lavender*, 2 Mont. & Ayr. 103. S. C. 4 Dea. & Ch. 496.

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### PROCEEDINGS.

1. Where the majority of the assignees wish the proceedings to be in the hands of a particular solicitor, the order is of course for their delivery accordingly, unless

gross misconduct be charged, and a cross petition for removal, or an injunction. *Ex parte Halford*, 2 Mont. & Ayr. 52. S. C. 4 Dea. & Ch. 271.

2. If the two assignees sign a joint order on the solicitor to deliver up the proceedings the Court will enforce it, though one subsequently virtually countermand the order. *Ex parte Halford*, 2 Mont. & Ayr. 53.

*See* REVERSING ADJUDICATION, 2, 3, 4, 5.

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### PROOF.

1. If a party proves a debt on a bill, and proceeds at law for the same debt, the Court will issue an injunction to restrain the action. *Ex parte Diack*, 2 Mont. & Ayr. 675.

2. Where a creditor applies to prove a debt, and claims a right to property in his possession on which the commissioners think he has no lien, they should admit the proof, and leave the question of lien to be controlled by retention of the dividend. *Ex parte Dobson*, 1 Mont. & Ayr. 666. S. C. 4 Dea. & Ch. 69.

#### *Affidavit.*

3. A deposition in support of proof on a bill must state the consideration. If a defective affidavit be produced, the commissioner should not reject but adjourn the proof. *Ex parte Maberly*, 2 Mont. & Ayr. 23.

#### *Amount proveable.*

4. A. owed 24,000*l.* to B., which C. guaranteed; then B. agreed to take 12,000*l.* on the joint notes of A. and C., and delivered up the guarantee; default was made in payment of the notes, and fiats issued against A. and C.: Held, B. could only prove against C. what



## DIGEST.

### PROOF—continued.

was due of the 12,000*l.* Ex parte *Powell*, 2 Mont. & Ayr. 533. S. C. 1 Dea. 378.

#### *Annuity.*

5. An annuity not proveable under 6 Geo. 4. c. 16. section 54. is not assisted under section 56. Ex parte *Vanheythusen*, 2 Mont. & Ayr. 523. S. C. 1 Dea. 360.

6. The instalments of an annuity, for the payment of which a bankrupt is surety only, and for the payment of which he covenants in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. (N. S.) 168.

7. An annuity may be valued though no price was given for it. Cross, J., semb. dissent. Ex parte *Annandale*, 2 Mont. & Ayr. 19.

#### *Attachment.*

8. C. brought an action of debt against F. in the Lord Mayor's court, and issued an attachment against B., who had funds of B.'s; W. filed a bill against C., B., and F., claiming a lien on the funds, and obtained an ex parte injunction to restrain proceedings in the Lord Mayor's Court; while the injunction was in force F. became bankrupt: Held, that though C. might, but for the injunction, have sued out execution before F. became bankrupt, yet he was not entitled to be paid otherwise than rateably with the other creditors. *Ullock v. Barber*, 6 Sim. 300.

#### *Bills.*

9. A deposition in support of a proof on a bill must state the consideration. Ex parte *Maberty*, 2 Mont. & Ayr. 23.

10. An offer of composition by the acceptor of bills, not acceded to, with a declaration, in the presence of the holder, that he (the acceptor) had not and should not provide for them, does not dispense with the necessity of presentation and notice of dishonour, and neglect prevents proof against the drawer. Ex parte *Bignold*, 2 Mont. & Ayr. 633.

11. If bills of third persons are indorsed to and deposited by the bankrupt with a creditor as collateral security for a debt, and afterwards paid by such third persons, their value must be deducted from the proof. Ex parte *Brunskill*, 2 Mont. & Ayr. 220.

#### *Bills, — Accommodation.*

12. Bentley and Co. accepted an accommodation bill for Gomersall and Co., who indorsed it to Vere and Co., and deposited it with them as security for advances: Held, Vere and Co. may prove the amount against Bentley and Co. Ex parte *Vere*, 2 Mont. & Ayr. 123. S. C. 4 Dea. & Ch. 295.

#### *Bonds.*

13. The Court can rectify a clear mistake in the condition of a bond to enable a proof to be made. Ex parte *White*, 2 Mont. & Ayr. 541.

#### *Checks.*

14. A person having credit with a bank received money from the agent of the bank, and every week gave him a check for the amount advanced during the week, which the agent sent to the bank, as a voucher for himself; this check was drawn more than ten miles from the bank, and post-dated: Held, not within the penalties of section 13. of 55 Geo. 3. c. 184. Ex parte *Bignold*, 2 Mont. & Ayr. 632.



## DIGEST.

### PROOF—continued.

15. A person issues checks more than ten miles from the bank where payable: Held, to bring the bank within the penalties of section 13. of 55 Geo. 3. c. 184., it must be proved that the bankers paid the checks knowing that they were issued more than ten miles off. Ex parte *Bignold*, 2 Mont. & Ayr. 633.

16. Striking balances does not prevent the operation of 55 Geo. 3. c. 184. s. 13. Ex parte *Bignold*, 2 Mont. & Ayr. 633.

17. Letters or orders for money sent by the hands of the servants of a person having credit with a bank, more than ten miles from the customer's residence, and on which money is paid, are not drafts or orders for payment of money within section 13. of 55 Geo. 3. c. 184. *Swan v. The Bank of Scotland*, 2 Mont. & Ayr. 661.

18. A bond to pay all sums a trader may owe a banker does not cover balances, part of the items of which consist of sums paid by the banker's agents on drafts illegal within section 13. of 55 Geo. 3. c. 184. *Swan v. The Bank of Scotland*, 2 Mont. & Ayr. 657.

19. Accounts taken and balances struck do not prevent the penalties of 55 Geo. 3. c. 184. s. 13. *Swan v. The Bank of Scotland*, 2 Mont. & Ayr. 665.

### Clerks.

20. If a clerk hired for a year continue in the bankrupt's office after the bankruptcy, and then, in the middle of the year, the contract be rescinded by mutual consent, on the understanding that the clerk is to be paid rateably for his services during the current year, no part of the wages due from the expiration

of the year last before the fiat up to the time of rescinding is proveable, nor is the case within 6 Geo. 4. c. 16. s. 48. *Thomas v. Williams*, 1 Adol. & Ellis, 685.

### Composition.

21. A composition creditor who receives a bond as part of the composition is, when the old debt revives, entitled to retain the bond on a question of proof. Ex parte *Reay*, 2 Mont. & Ayr. 33. S. C. 4 Dea. & Ch. 525.

22. Upon a composition, the original debt revives upon failure, of the debtor in performing his undertaking, or upon bonâ fide reviving the old debt. Ex parte *Crosbie*, 2 Mont. & Ayr. 393. S. C. 1 Dea. 107.

23. A composition creditor who receives an assignment of debt as security for the composition, is not when the old debt revives entitled to retain the debts on a question of proof. Cross, J., dissent. Ex parte *Ellis*, 2 Mont. & Ayr. 370.

24. An insolvent compounds with her creditors for 13s. 6d. in the pound, but promises to pay one of her creditors the whole of his debt in order to induce him to sign the composition deed; after paying him in full she contracts a fresh debt with him and then becomes bankrupt: Held, that the payments made to the creditor above the composition of 13s. 6d. in the pound were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting these payments. Ex parte *Minton*, 3 Dea. & Ch. 688. S. C. 1 Mont. & Ayr. 440.

### Contingencies.

25. A contingent annuity is proveable under 6 Geo. 4. c. 16.



## DIGEST.

### PROOF—continued.

s. 54. before the happening of the contingency. *Ex parte Vanheythusen*, 2 Mont. & Ayr. 519. S. C. 1 Dea. 360.

26. An annuity payable while a person continues to superintend salt works, which may be discontinued by the brine not flowing or by the lease of the brine pits becoming forfeited, is capable of valuation. *Ex parte Parratt*. 2 Mont. & Ayr. 626.

27. Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz. "I promise you, until it is convenient to me to do something better for you, to allow my daughter 100*l.* a-year, which you can have as you may require:" Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and though no other evidence of the genuineness of the letter, held to be proveable. Sir J. Cross dissent., upon the ground that the facts required further investigation. *Ex parte Anandale*, 2 Dea. & Ch. 511.

28. The bankrupt having received 550*l.* with his wife on his marriage gave a bond to trustees conditioned for the payment of 1,100*l.* on receiving notice from the trustees: Held, that although no notice was given to the bankrupt before his bankruptcy this was nevertheless a contingent debt proveable within the provisions of the 56th section of 6 Geo. 4. c. 16. *Ex parte Hooper*, 3 Dea. & Ch. 655.

### *Equitable Mortgage.*

29. The Court cannot sanction an agreement between the parties

to waive the objection of want of a proper stamp. *Owen v. Thomas*, 3 Myl. & Kee. 353. (a)

### *Executors.*

30. Where one of two executors becomes bankrupt, the solvent executor may prove against the bankrupt's estate without an order. *Ex parte Courtney*, 2 Mont. & Ayr. 227. S. C. Dea. & Ch. 456.

### *Felony.*

31. Where an actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt, and five indictments were preferred which failed from technical reasons which would apply to any other indictment, the proof was allowed for the whole sum embezzled. *Ex parte Jones*, 2 Mont. & Ayr. 193. S. C. 3 Dea. & Ch. 525.

32. A proof resting on a felony cannot be made till after a prosecution except where conviction is hopeless. *Ex parte Jones*, 2 Mont. & Ayr. 203. S. C. 3 Dea. & Ch. 525.

### *Gaming Debts.*

33. A person collected subscriptions from the members of a club to run greyhounds, on account of the treasurer, and became bankrupt: Held, the treasurer might prove for the amount, the debt not being a gaming debt. *Ex parte King*, 2 Mont. & Ayr. 676.

### *Guarantee.*

34. A. owed 24,000*l.* to B., which C. guaranteed, then B. agreed to take 12,000*l.* on the joint notes of A. and C., and gave up the guarantee; the notes were not given, and

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(a) On proofs under equitable mortgages, where there is a written agreement, the stamp is usually dispensed with.



## DIGEST.

### PROOF—continued.

fiats issued against A. and C.: Held, B. could only prove what remained due of the 12,000*l.*, as the original guarantee was not revived. Ex parte *Powell*, 2 Mont. & Ayr. 533.

35. H. S., who employed E. & Co. as his bankers and L. & Co. as his general agents, gives E. & Co. the following undertaking:—"In consideration of your allowing L. & Co. to draw upon you to the extent of 12,000*l.* and your accepting three drafts accordingly, I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided either by myself or L. & Co. in direct discountable bills." E. & Co. accordingly accept and pay these drafts, in consideration of which they receive from H. S. and L. & Co. various substituted bills. H. S. and L. & Co. respectively become bankrupt while the substituted bills are still running, and which are not paid when they fall due: Held, that L. & Co. were entitled to prove under the commission against H. & S. the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee as an original undertaking of H. S. as principal. And, semble, it would have been proveable even though the instrument was considered as a guarantee. Ex parte *Simpson*, 3 Dea. & Ch. 792.

### *Insolvent Debtor's Schedule.*

36. A creditor whose debt is inserted in the debtor's schedule on his passing the Insolvent Debtor's Court may prove that debt under a subsequent fiat against the debtor.

Ex parte *Fenwick*, 2 Mont. & Ayr. 681.

### *Jurisdiction.*

37. Where A. combines with B., also A. with C. and A. with D., &c., to prove fictitious debts on the proceedings in pursuance of a fraudulent plan, a petition will not lie praying that A., B., C., and D. may pay the gross amount of costs incurred by the estate and consequential to such fraudulent plan. Such debts being subsequently expunged, the Court cannot order fictitious bills on which the proof was made to be delivered up, unless it appears they were delivered by the bankrupt after his bankruptcy. See other points in the margins, post. Ex parte *Brand*, 2 Mont. & Ayr. 708. S. C. 1 Dea. 308. 1

### *Marriage.*

38. What is sufficient evidence of a marriage contract to entitle a party to prove. Ex parte *Annan-dale*, 2 Mont. & Ayr. 19. See this head, infra *Wife's Provision*, 56.

### *Merchants' Accounts.*

39. Quære, What amounts to a mutual account within the exception in the 21 Jac. 1. c. 16. s. 3. as to merchants' accounts, and how affected by the 9 Geo. 4. c. 14. And quære, Whether the exception need be pleaded specially. *Moore v. Strong*, 1 Scott, 369.

### *Partnership.*

40. The rule that proof cannot be made on a joint debt if there is a solvent partner, only applies to actual partnerships, not to cases where one joins in a joint promissory note as surety, &c. for another, they not being partners. Ex parte *Crosfield*, 2 Mont. & Ayr. 543.

41. B. is a partner with A. as nail manufacturers, and with C. as



## DIGEST.

### PROOF—continued.

grocers. The firm of B. & Co. advance monies to the firm of A. & B.: Held, that as B. & C. were not liable for the debts of A. & B., B. & C. could prove under a fiat issued against A. & B. Ex parte *Thompson*, 3 Dea. & Ch. 612.

42. A partnership of A., B., and C. is dissolved, A. and B. agreeing to pay all the partnership debts. D., a creditor of the old firm, ignorant of the terms of the dissolution, applies for payment, and A. and B. by letter beg time, and ultimately D. draws a bill on A., B., and C. which A. and B. accept in the name of A., B., and C., but without C.'s authority. A. and B. also, by letter signed by them alone, promise payment of the bill. A. and B. become bankrupts; C. also becomes bankrupt: Held, under the circumstances, that D. might prove the amount of the bill against A. and B.'s estate. Ex parte *Liddard*, 4 Dea. & Ch. 603.

43. Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners, and not then if there has been any waiver of the tortuous act by the other partner, so as to reduce it to a matter of contract. Ex parte *Turner*, 4 Dea. & Ch. 169.

44. The rule that a proof cannot be made on a joint debt, if there is a solvent partner, applies to actual partnerships only, not to cases where one joins in a promissory note as surety, &c. for another, they not being partners. Ex parte *Crosfield*, 2 Mont. & Ayr. 534. S. C. 1 Dea. 405.

45. Where a partner retires and assigns his interest to the continuing partners, but no notice is given to

the joint creditors, they cannot prove against the separate estates. Ex parte *Leaf*, 1 Dea. 176.

46. One of several partners, previous to marriage, agreed with the trustees of his intended wife to assign them a portion of his capital in the business, and secure them certain periodical payments of 500*l.*; in pursuance with this agreement, the partnership placed 3,000*l.* to the trustees' credit in the partnership books, debited the partner therewith, and gave the trustees notice they had transferred the sum to the partner's private account; default was made in payment of the payments of 500*l.* and the firm became bankrupt: Held, there was an acknowledgment of a present debt from the firm in the trustees, constituting a debt proveable against the joint estate. Ex parte *Hill*, 1 Dea. 123.

### Practice.

47. Commissioners ought not to act on a general rule to reject a proof because the item is not entered in an account book when books are kept, *semble*. Ex parte *Knight*, 2 Mont. & Ayr. 545. S. C. 1 Dea. 408.

48. A proof of debt cannot be rejected by a commissioner merely because there are no entries in the books of the parties seeking to prove, *semble*. Ex parte *Beasley*, 2 Mont. & Ayr. 632.

### Principal and Surety.

49. In general a release to the principal is a release to the surety, but if the surety has, previously to such release paid part of the debt, and given security for the remainder, that rule does not apply. *Hall v. Hutchins*, 3 Myl. & Kee. 426.



## DIGEST.

### PROOF—*continued.*

50. If A. and B. give a joint and several promissory note for the debt of C., and B. becomes bankrupt, and A. pays the amount; he cannot prove against B. as a surety under section 52. Ex parte *Porter*, 2 Mont. & Ayr. 281.

#### *Reduction.*

51. A proof reduced on the petition of the bankrupt, but by consent. Ex parte *Pownall*, 2 Mont. & Ayr. 707.

#### *Security.*

52. Where a bill is exhibited at the time of proving, and afterwards is bonâ fide lost, the commissioner should give special directions, dispensing with its production, on application for a dividend. Ex parte *Wallas*, 2 Mont. & Ayr. 586.

53. A., the holder of the bankrupt's promissory note, having security in his hands for the full amount, indorses the note to B. and retains the security. Quære, Whether B. can prove on the note without deducting or mentioning the security. Ex parte *Paramore*, 1 Dea. 279. But quære, Where is the doubt?

54. Where goods in which the bankrupts were jointly interested were pledged with a creditor to secure payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove: Held, he must deduct the amount before he could prove on the acceptance; aliter if the goods had belonged to A. B. alone. Ex parte *Prescott*, 4 Dea. & Ch. 23.

#### *Statute of Limitations.*

55. A running account between a solicitor and another person is with-

in the exception of the statute of limitations, and the debt on the balance is proveable. Ex parte *Seaber*, 2 Mont. & Ayr. 588.

See ante, *Merchants' Accounts*, 39.

#### *Wife's Provision.*

56. A trader covenanted to pay a sum to four trustees of his marriage settlement, on trust to pay half the interest to wife, half to husband, and usual trusts for wife and children; he became bankrupt, having paid part only, two of the trustees were allowed to prove, and the dividends on the whole proof paid into Court, and accumulated till the amount agreed by the husband is made up, with liberty for any party to apply. Ex parte *Smith*, 2 Mont. & Ayr. 586. S. C. (but with a different order) 1 Dea. 385. The order was afterwards varied, 2 Mont. & Ayr. 744.

57. By the terms of the bankrupt's marriage settlement the wife's property was settled upon her, in case of the bankrupt's death or the parties being divorced, but the bankrupt was entitled to the interest for his life, and in case he survived his wife he was to have a certain share of her property: Held, that the wife might, in the name of her trustee, make such proof as the commissioners might think she was entitled to. Ex parte *Saunders*, 3 Dea. & Ch. 568.

58. By the terms of a devise the interest of a sum was payable to a bankrupt for life, remainder to his children: the trustees (of which the bankrupt was one) were authorized to lend the principal to the firm, who afterwards became bankrupt, and it was lent accordingly: On bankruptcy and proof against the firm, Held, the dividend on the proof should be invested in stock,



## DIGEST.

### PROOF - *continued.*

the interest of which was to accumulate, in the first instance, till the principal sum was made good. Ex parte *King*, 2 Mont. & Ayr. 410. S. C. 1 Dea. 143.

59. The bankrupt, previous to his marriage, entered into a bond, that if his wife survived, and should within two months of his death, at the costs of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay her 2,000*l.* The wife survived, but did not within three months release her dower: Held, the bond was not proveable 6 Geo. 4. c. 16. s. 56 as the contingency had not happened. Ex parte *Davies*, 1 Dea. 115.

*Usury.* See USURY.

See AWARD.—CERTIFICATE.—CONSOLIDATION.

### PRESENTING BILLS.

See PROOF, 10.

### PROPERTY PASSING TO ASSIGNEES.

See ACTIONS BY AND AGAINST ASSIGNEES, 6 to 11.

#### *Generally.*

1. One G. was let into possession of land allotted to one P., under an inclosure act in 1814, upon a contract of sale, under which one half of the purchase money was paid, and interest upon the remaining moiety regularly till the year 1828, when G. became bankrupt. No conveyance was ever executed, nor was the remainder of the purchase money ever paid: Held, that the possession by G. under this in-

choate contract was not adverse to the title of P., the vendor, and that the assignee of P. might maintain ejectment, notwithstanding the lapse of twenty years from the time possession was first given: Held, also, that it was not competent to G. or to one claiming under him to contest the title of P., by reason of the want of an award by the commissioners under the act. *Doe v. Edgar*, 2 Scott, 733.

2. Where the goods of an insolvent are sold under an execution, and the produce of the sale paid to the execution creditors, after the imprisonment of the insolvent, his assignees subsequently appointed may recover such produce as money had and received to their use. *Guy v. Hitchcock*, 5 Nev. & Mann. 660.

3. After L., a trader, had committed a recent act of bankruptcy, M. & Co., his creditors, knowing him to be embarrassed, pressed him for payment; L. said he had no money, but if they could get a customer for his goods they should be paid. M. & Co. accordingly procured the defendant A., a creditor of their own, to buy goods of L. No money passed from A. to L. or to M. & Co., but A. gave M. & Co. credit on account. This transaction was communicated to L., and a receipt was given him by M. & Co., signed by them, specifying it to be "by payment of defendant A., agreeably to his order, balancing their account with him." A fiat having issued against L., his assignees sued A. in assumpsit for the price of the goods sold to him: Held, if the payment made by A. to M. & Co. was not stipulated for in the original contract, but was merely directed afterwards by L., and had not been acted on, the direction was revocable by him be-



## DIGEST.

### PROPERTY PASSING TO ASSIGNEES—*continued.*

fore his bankruptcy, or by his assignees afterwards, and the plaintiffs were entitled to recover. *Bradbury v. Anderton*, 5 Tyrw. 152.

4. To establish a *prima facie* case of possession by the bankrupt, the assignees must prove that it continued down to the bankruptcy. *Ody v. Grainger*, 1 Tyrw. & Grainger, 586.

5. H. and P., drawers of a bill on, and accepted by P. & Co. for 2,000*l.*, indorse it to A. for his accommodation. W. & Co. discount it for A., together with another bill drawn by A. for 2,000*l.* upon and accepted by S. & Co. A. and H. and P. & Co. severally become bankrupts. W. & Co. receive dividends from S. & Co.'s estate, 666*l.* 13*s.* 4*d.* on S. & Co.'s acceptance; also 750*l.* from H. and P.'s estate, on the bill drawn by them. They also prove against A.'s estate for 3,333*l.* 6*s.* 8*d.*, as the amount of H. and P.'s bill, and balance of A.'s bill on S. & Co., after deducting the 666*l.* 13*s.* 4*d.* received from S. & Co., and receive 277*l.* 15*s.* 6½*d.* dividend thereon, 166*l.* 14*s.* 4*d.* being in respect of the proportion of proof on H. and P.'s bill. P. & Co. stopped payment, and under a composition deed W. & Co. received 1,000*l.* in respect of H. and P.'s bill. Total in respect of H. and P.'s bill, 1,916*l.* 13*s.* 4*d.*, leaving balance, 83*l.* 6*s.* 8*d.* Semble, (W. & Co. claiming to have a right to retain H. and P.'s bill, in order to work out their remedies against A. in respect of A.'s bill,) that the assignees of H. and P., although they tendered the balance, 38*l.* 6*s.* 8*d.*, could not compel W. & Co. to deliver up H. and P.'s bill. *Quære*, Whether the Court has jurisdiction

on a subject of litigated title as to this: Held, that W. & Co. were not bound to receive the 38*l.* 6*s.* 8*d.* The petition was premature, at all events, till the bill was fully paid off. *Ex parte Dickson*, 4 Dea. & Ch. 614.

6. Blythe was the agent for Maberly, a banker. 450*l.* was sent to Blythe as agent, to retire a note of the petitioner's, which was not done, as Maberly became bankrupt. Blythe having a claim against Maberly, the assignees allowed him to retain 2,000*l.*, including, as was assumed, the 450*l.*: Held, the petitioner was entitled to recover the 450*l.* from the assignees. *Ex parte Simpson*, 2 Mont. & Ayr. 294. S. C. 1 Dea. 47.

7. A. and B. have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated intervals. B. became bankrupt, and his agent in Scotland had in his possession notes of A. for 230*l.*, and A. had notes of B. for 764*l.* B.'s agent refused to exchange the notes, claiming a lien thereon, and B.'s assignees allow the agent to retain those notes in satisfaction of such lien: Held, A. was entitled to recover the value of the notes from the assignees of B. *Ex parte The National Bank of Scotland, re Maberly*, 4 Dea. & Ch. 32.

8. The bankrupt had two agents, one at Glasgow, the other at Edinburgh. A. paid to the agent of the Glasgow bank a sum in bank notes for the purpose of being remitted to London, which the Glasgow agent transmits for that purpose in a parcel to the Edinburgh agent, from whom the notes are stolen by his clerk the day after the parcel is



## DIGEST.

### PROPERTY PASSING TO ASSIGNEES—*continued.*

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delivered, and a few days before the fiat issued against the bankrupt: Held, that A. had no claim to recover the value of the notes from the assignees. *Ex parte Watson*, 4 Dea. & Ch. 45.

#### *Act of Bankruptcy.*

See ACT OF BANKRUPTCY, *Time.*

#### *Fraud.*

9. The assignees can never ground a title on the fraud of the bankrupt. *Ex parte Carlow*, 2 Mont. & Ayr. 40.

#### *Freight.*

10. On an assignment of the *whole* freight to be earned of a ship, the assignees of the bankrupt assignor are not entitled to sue as having the legal interest. *Leslie v. Guthrie*, 4 Scott, 687.

11. An assignment of the freight of a ship, to be thereafter earned on a particular voyage, is good against the assignees of the bankrupt assignor. *Leslie v. Guthrie*, 4 Scott, 683. shaking, if not overruling, *Robinson v. Macdonnell*, 5 M. & Sel. 228.

#### *Judgments.*

12. Trover lies at the suit of the assignee of an insolvent debtor against an execution creditor, for a sale, after the commencement of the insolvent's imprisonment, of goods seized before, under a fi. fa. issued upon a warrant of attorney, 7 Geo. 4. c. 57. s. 34. *Keley v. Minter*, 1 Scott, 616.

#### *Wife's Property.*

13. A married woman, being entitled under a will to stock and cash, forming part of a residue, her

husband wrote to one of the executors, requesting that the stock might be transferred into the names of certain trustees for the wife's separate use, and that the cash might be paid to himself; these requests were complied with. The husband employed part of the cash in increasing the amount of stock; he afterwards became bankrupt, and died: Held, the stock transferred by the trustees was not reduced into possession by the trustees, and therefore belonged to the wife by survivorship, but that the assignees were entitled to the increase made in the stock by the husband. *Ryland v. Smith*, 1 Myl. & Craig, 53.

14. A testator gave 4,000*l.* in trust for his married daughter for life, then to her husband for life, and then for the children. The husband owed the testator 6,000*l.* on bond; the testator directed that, if not paid off in his life-time, it should be taken in satisfaction of the 4,000*l.* 950*l.* was paid on the bond, and invested in stock; the husband became bankrupt, and the executor proved the remaining bond debt, and invested the dividends in stock; the wife died: Held, the interest of the stocks was to accumulate till the 4,000*l.* was made good, and then the assignees to be entitled to the interest during the husband's life. Sir J. Cross diss. *Ex parte Young*, 2 Mont. & Ayr. 228.

See ENTAILS.—WIFE'S PROPERTY.

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### PROPERTY UNDER RESTRAINT OF ALIENATION.

1. A. assigned 800*l.* to trustees, in trust during the life of B., or such part thereof as they should think proper, or at such other times and in such proportions as they



## DIGEST.

### PROPERTY UNDER RESTRAINT OF ALIENATION— *continued.*

should judge expedient, to pay the interest to him; or, if they should think fit, to lay it out in procuring for him diet and other necessities, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper, and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts, disposition, or engagements; and after his death, the 800*l.*, and all savings and accumulations of interest, if any, should be in trust for his children, and if he should have none, then in trust for C. B. became bankrupt, and the trustees had paid him the interest down to his bankruptcy: Held, his life-interest passed to his assignees; the Vice Chancellor saying, "It is plain that the grantor did not intend to exclude the assignees, and that object might have been effected if there had been a clear gift over." *Snowdon v. Dales*, 7 Sim. 524.

2. A proviso that if the lessee, his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him, &c., by confession or otherwise, whereby any reasonable probability might arise of the estate being extended, then the estate should determine, and the lessor have power to re-enter. The lessee bequeathed the term to his executors in trust for his widow; an executor died, and the other became bankrupt: Held, the lessor might re-enter. *Doe v. David*, 5 Tyrw. 125.

See CONDITIONS AS TO BANKRUPTCY.

### PURCHASES BY ASSIGNEES. See ASSIGNEES, 16, 17.

### QUORUM COMMISSIONERS. See COMMISSIONERS, 2, 3.

### RE-ANSWERING.

The Court will not re-answer a petition for a more distant day, because the respondent has not been served four days before his attendance on it is required. *Ex parte Peake*, 3 Dea. & Ch. 551.

See SERVICE, 1.

### RECOMMENDING COMMISSIONERS TO HEAR COUNSEL.

See ADJUDICATION, 2.

### REFERENCES.

1. The Court will refer it to the commissioner, to inquire whether an arrangement between the assignees and creditors is beneficial. *Ex parte Kirby*, 2 Mont. & Ayr. 143.

2. A reference to the commissioner ordered to report whether a pecuniary arrangement by the assignees would be beneficial to the estate. *Ex parte Bradstock*, 2 Mont. & Ayr. 490.

3. The assignees having made an arrangement concerning the payment of the creditors' debts, a reference was ordered to the commissioners whether beneficial. *Re Hyslop*, 2 Mont. & Ayr. 289.

4. When a reference has been made to a London commissioner who refuses to act therein, the reference may go to an officer of the Court. References as to whether contracts are beneficial to the estate are reluctantly made. *Ex parte Bradstock*, 2 Mont. & Ayr. 593.

See ASSIGNEES, 20 to 23.—SCANDAL.



## DIGEST.

### REFUNDING DIVIDENDS.

See DIVIDENDS, 7.—EXPUNGING, 2.

### REGISTRATION.

An order of the Lord Chancellor in a suit by the assignees, ordered on their application to be registered in the Court of Bankruptcy. *Ex parte Williams*, 4 Dea. & Ch. 110.

### RE-HEARING.

1. A re-hearing may be brought on on a petition for re-hearing without obtaining a previous order for the re-hearing. *Ex parte Thompson*, 3 Dea. & Ch. 612.

2. The general rule is, that a petition may be re-heard on newly discovered facts. But a petition to annul or to stay the certificate cannot be re-heard on new evidence. *Ex parte Lavender*, 2 Mont. & Ayr. 117. S. C. 4 Dea. & Ch. 497.

3. Re-hearing necessary to substantially vary an order. *Ex parte Soper*, 4 Dea. & Ch. 569.

### REMOVED FIAT.

See FIAT, 6.

### REMOVING ASSIGNEES.

See ASSIGNEES, 18, 19.—SUITS, 1.

### RENT.

A., an insolvent debtor, who, with the permission of B., his assignee, remains in possession, and demises for years to C., may recover the rent from C., notwithstanding a notice from B. to C. requiring the reserved rent to be paid to him as such assignee. *Semble*, also, that under a demise by A., mortgagor in possession, to B., A. may recover the rent from B., notwithstanding a notice from C. the mortgagee requiring B.

to pay the rent to him C. *Partington v. Woodcock*, 5 Nev. & Mann. 672.

See PETITIONING CREDITOR'S DEBT, 1.

### RENTS AND PROFITS.

See EQUITABLE MORTGAGE, 17, 18, 19.—MORTGAGE, LEGAL.

### REPUTED OWNERSHIP.

#### *Possession of Bankrupt.*

1. Batley, before his bankruptcy, had on behalf of an unnamed principal (Harvey) taken some timber in exchange, to be delivered free on board ship, and at the same time bought other timber of the same party on his own account; it was delivered to Batley, and lay on a common mixed with other timber of his; after the act of bankruptcy, but two months before the commission, Harvey wrote to the vendor that he was the principal, and adopted the contract as to the exchange, and desiring the bankrupt should not be allowed to take them, and the vendor accepted Harvey as the purchaser accordingly; before the commencement of the two months, Harvey also required the bankrupt to deliver the timber to him (Harvey), and the bankrupt proposed to make up the deficiency by some of his own, but nothing further passed till within two months of the commission, when a formal delivery was made to Harvey of part of the exchanged timber: Held, in the reputed ownership of the bankrupt, up to the delivery; and that there was a delivery to the bankrupt, though not shipped, and that the delivery of the timber to Harvey was not within 6 Geo. 4. c. 16. s. 81.



## DIGEST.

### REPUTED OWNERSHIP— *continued.*

*Shaw v. Harvey*, 1 Adol. & Ellis, 920.

#### *Consent of true Owner.*

2. If the owner retake possession of property one day before bankruptcy, it is not in the reputed ownership of the bankrupt. Ex parte *Watkins*, 1 Dea. 296.

3. Where the true owner had permitted his goods to remain in the order and disposition of A. until the day before he became bankrupt, and then demanded the possession of them, which A. refused to deliver: Held, that they did not pass to A.'s assignees. *Smith v. Topping*. 5. Barn. & Adol. 674.

#### *Coal Barges.*

4. A coal merchant at the time of his bankruptcy had in his possession barges which bore his own name and number, and were registered in his name under the watermen's act. These barges he had hired of defendant, it being the custom for coal merchants to hire barges, and to paint on them the name of the hirer: Upon a question whether the barges passed to the coal merchants assignees under the bankruptcy, Held, that it was properly left to the jury to find whether the custom to hire was generally notorious in the coal trade, and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. *Watson v. Peache*, 1 Bing. (N.S.) 327. S. C. 1 Scott, 149.

#### *Fixtures.*

5. Trade fixtures, attached by the landlord, who is mortgagor in possession, are not in his reputed ownership. Ex parte *Wilson*, 2

Mont. & Ayr. 61. S. C. 4 Dea. & Ch. 143.

6. The owner of the freehold gave a mortgage for the term of years, but remained in possession, while in possession he added fixtures: Held, the fixtures were not in his reputed ownership. Ex parte *Belcher*, 2 Mont. & Ayr. 160.

7. A., who was partner with B., deposited with their bankers the deeds of a freehold cotton-mill belonging to A. as a security for advances made by the bankers, for the use of the firm of A. and B., a steam-engine and other machinery having been, previously to the deposit, erected by A. and B. for the purposes of their trade. A. and B. continued in possession of the premises and the machinery up to the period of their bankruptcy: Held, that the steam-engine and machinery, though removeable by a tenant as fixtures erected by him for the purposes of trade, yet being firmly attached to the walls and floors of the buildings, and being such fixtures as are frequently put up by the owners of cotton-mills, and let with the mill to a tenant, were not to be considered as in the reputed ownership of the bankrupts within the meaning of the 6 Geo. 4. c. 16. s. 72. Ex parte *Lloyd*, 3 Dea. & Ch. 765.

#### *Freight.*

8. A., on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A. on behalf of the owner a certain sum for the freight of the ship, by two instalments, one to be paid on the sailing of the ship, and the other on the completion of the voyage. The owner being indebted to C., ordered in writing A. to pay C. all monies he might receive under the charter-party, and accordingly



## DIGEST.

### REPUTED OWNERSHIP— *continued.*

A. paid over the first instalment to C. The owner then assigned by deed the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt: Held, that the remainder of the freight was not in his order and disposition at his bankruptcy. *Gardner v. Lachan*, 6 Simon, 407.

#### *Notice.*

9. On a deposit of a policy by way of equitable mortgage, the onus lies with the assignees to prove that notice was not given to the office before the bankruptcy. Ex parte *Stephens*, 4 Dea. & Ch. 117. *Quære tamen.*

10. A party to whom the bankrupt had assigned a policy of assurance sent an agent to the office to pay the annual premium, who, in conversation with one of the clerks in the office, told him of the policy having been so assigned: Held, not sufficient notice to the office. Ex parte *Carbis*, 4 Dea. & Ch. 354. S. C. 1 Mont. & Ayr. 693.

11. An allegation that one of the directors and an actuary of an insurance company "knew" shares not to be the bankrupt's (he being a trustee) is not sufficient to prevent reputed ownership. Ex parte *Burbridge* (erroneously printed ex parte *Watkins*) 2 Mont. & Ayr. 348. S. C. 1 Dea. 131. reversing ex parte *Watkins*, 1 Mont. & Ayr. 685. S. C. 4 Dea. & Ch. 87.

12. If the mortgagee be himself a trustee, to whom notice must be given, the transaction itself is notice enough to prevent reputed ownership. Ex parte *Smart*, 2 Mont. & Ayr. 60.

13. In deposits of shares of insurance companies when the parties are partners thereof, the transaction itself is sufficient notice. Ex parte *Waithman*, 2 Mont. & Ayr. 364. S. C. 4 Dea. & Ch. 412.

14. If the owner of shares in an insurance company assign them by way of mortgage, and give notice to the company, but owing to an informality in the assignment, the company do not recognize the mortgagee's title, and the shares still stand in the bankrupt's name, they are not in his reputed ownership. Ex parte *Masterman*, 2 Mont. & Ayr. 209.

15. If a cestuique trust assign his interest, and the assignee do not give notice to the trustee, but assign over, the new assignee need not give notice. Ex parte *Newton*, 2 Mont. & Ayr. 51.

16. The bankrupt deposited with a party, by way of equitable mortgage, an assignment which had been made to the bankrupt of a reversionary interest under a will; no notice of the assignment was given to the executors: Held, the property was not in the order and disposition of the bankrupt. Ex parte *Newton*, 4 Dea. & Ch. 138.

17. As to an assignment of a policy of assurance where the grantor keeps it, and no notice is given to the office. See *Fortescue v. Barnett*, 3 Myl. & Kee. 36. which, though not a case of reputed ownership, may be useful.

18. It has been decided under the sect. 30. of the insolvent act (7 Geo. 4. c. 57.) that a debt due to the insolvent will pass to the provisional assignee, though it had been assigned to a third party before the imprisonment of the insolvent, if no notice of assignment of the debt was given to the debtor before the



## DIGEST.

### REPUTED OWNERSHIP— *continued.*

imprisonment. *Buck v. Lee*, 1 Adol. & Ellis, 804.

19. To assumpsit by two plaintiffs for goods sold, &c. defendant pleaded the bankruptcy of one; replication that before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Adol. & Ellis, 809.

20. In an action of assumpsit by two plaintiffs for goods sold, the defendant pleaded the bankruptcy of one plaintiff; the replication was that before the bankruptcy the bankrupt plaintiff assigned the debt, and that he only sued as trustee for the co-plaintiff: Held, the replication was bad, in not stating the debtor had notice; but leave given to amend. *Dean v. Davies*, 1 Adol. & Ellis, 809, in note.

#### *Partnership.*

21. Furniture the separate property of one partner, used by the firm, is not in the reputed ownership of the firm ut semble. Ex parte *Hare*, 2 Mont. & Ayr. 479. S. C. but differently reported, 1 Dea. & Ch. 16.

#### *Personalty.*

22. An assignment of personalty is sufficiently perfected by a deed of assignment; and if the bankrupt afterwards remains in possession, it is only evidence of fraud. *Carr v. Burdiss*, 5 Tyrw. 316.

#### *Policies.—Shares in Company.*

23. In deposits of shares of insurance companies where the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership. Ex parte *Waithman*, 2 Mont. & Ayr. 364. S. C. 4 Dea. & Ch. 412.

24. If the owner of shares in an insurance company assign them by way of mortgage, and give notice to the company, but owing to an informality in the assignment, the company do not recognize the mortgagee's title, and the shares still stand in the bankrupt's name, the shares are not in his reputed ownership. Ex parte *Masterman*, 2 Mont. & Ayr. 209.

25. Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares; but the shares belong to another person, in whose favour there exists a secret declaration of trust, the shares are in the reputed ownership of the bankrupt. That one of the directors and an actuary knew the shares not to be the bankrupt's is not sufficient to prevent reputed ownership. Ex parte *Burbridge* (erroneously printed ex parte *Watkins*), 2 Mont. & Ayr. 348. S. C. 1 Dea. 131. reversing ex parte *Watkins*, 1 Mont. & Ayr. 685. S. C. 4 Dea. & Ch. 87.

26. Where one is a secret trustee for another of shares in a joint stock banking company, his executing a declaration of trust the same day as the day of the act of bankruptcy does not prevent the shares being in his reputed ownership. Ex parte *Ord*, 2 Mont. & Ayr. 724. S. C. 1 Dea. 166. But quære.

27. By a clause in a deed of settlement of a banking company it was stipulated the company should



## DIGEST.

### REPUTED OWNERSHIP— *continued.*

have a lien on the shares of such of the proprietors as were indebted to the bank, and that no share should be transferred without consent of the directors, and an abstract of their provisions was indorsed on the certificate of the share held by each partner: Held, shares in the bankrupt's hands did not pass to the assignees as in his reputed ownership, so as to deprive the company of the lien. Ex parte *Plant*, 4 Dea. & Ch. 160.

#### *Return Proceeds.*

28. Flower accepted bills to enable Cornie to make shipments to Sydney, on an agreement, known at Sydney, to apply the return proceeds in payment of the bills. On the last shipment Cornie sent notice to Sydney to send the proceeds direct to Flower, and gave the same notice to a partner of the Sydney house who happened to be in London. Before the notice arrived at Sydney the return proceeds were sent off to Cornie, who became a bankrupt, and his assignees received them: Held, not in his reputed ownership, and Flower entitled thereto. Ex parte *Flower*, 2 Mont. & Ayr. 224.

29. If there be three persons who are partners in a particular transaction, in which one furnishes the bills and the other two accept bills for the price, and it be agreed that the bills are to be paid out of the return proceeds of the goods, and the two acceptors become bankrupt, the indorsees of the bills, without notice of the agreement, are entitled to the benefit of it after the joint creditors, if any, of the three are paid. The return pro-

ceeds are not in the reputed ownership, being clothed with a trust. Ex parte *Copeland*, 2 Mont. & Ayr. 177.

#### *Trusts.*

30. Where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership. Ex parte *Carlow*, 2 Mont. & Ayr. 39. S. C. 4 Dea. & Ch. 120.

31. A secret declaration of trust will not prevent shares in a company being in reputed ownership. Ex parte *Burbridge* (erroneously printed ex parte *Watkins*), 2 Mont. & Ayr. 348. S. C. 1 Dea. 131. reversing ex parte *Watkins*, 1 Mont. & Ayr. 685. S. C. 3 Dea. & Ch. 87.

32. A declaration of trust of shares in a joint stock bank executed the same day as the act of bankruptcy, will not prevent reputed ownership. Ex parte *Ord*, 2 Mont. & Ayr. 724. S. C. 1 Dea. 166. But quære.

33. M. & A., partners, were consignees of a West Indian estate, and in that character became creditors to the estate. By deed long prior to the bankruptcy the estate was conveyed to trustees, M. being one of them, on trust to apply the proceeds to certain purposes, one of which was to pay off the debt due to M. & A.; M. & A. assign their debt to S. & Co.; M. & A. become bankrupt, but prior thereto they receive ten hogsheads of sugar, which remain in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy seventy-four hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads:



## DIGEST.

### REPUTED OWNERSHIP— *continued.*

Held, that the sugars came to the hands of M. & A. clothed with trusts to pay the proceeds to M. as trustee, and were not in the reputed ownership of M. & A., but must be applied to pay off the debt assigned to S. & Co., and in discharge of the other trusts of the deed; M., as trustee, being affected with notice to M. & A. of the assignment of their debt. Held also, a case within principle of *ex parte Waring*, 14 Ves. *Ex parte Smith*, 4 Dea. & Ch. 579.

#### *Wife's Property.*

34. Furniture settled to the separate use of a wife, the possession being consistent with the settlement, is not in the reputed ownership of the husband. *Ex parte Massey*, 2 Mont. & Ayr. 173. S. C. 4 Dea. & Ch. 405.

See PROPERTY PASSING TO ASSIGNEES, 16, 17.

### RESTRAINING.

1. It requires a very strong case to restrain a bankrupt from disputing his commission. *Ex parte Chambers*, 2 Mont. & Ayr. 476.

2. Perpetual injunction issued to restrain the bankrupt proceeding at law to invalidate a commission issued nearly four years back, after actions and unsuccessful petitions and acts of acquiescence. *Ex parte White*, 2 Mont. & Ayr. 104.

See ASSIGNEES, 8.

### RESTRAINT OF ALIENATION. See PROPERTY UNDER RESTRAINT OF ALIENATION.

### RETAINER OF SOLICITOR. See ASSIGNEES, 11.

### RETURN PROCEEDS. See REPUTED OWNERSHIP, 28, 29.

### REVERSING ADJUDICATION.

1. On a petition to reverse the adjudication, the bankrupt will not be allowed to inspect the proceedings where he has filed no affidavit in support of his petition. *Ex parte Whalley*, 2 Mont. & Ayr. 722.

2. A bankrupt petitioning to reverse the adjudication will not be allowed to inspect the proceedings when no affidavit has been filed in support of the petition. *Anon.* 4 Dea. & Ch. 141.

3. When an affidavit had not been filed in support of a petition to reverse the adjudication, which was a fishing petition, and an action had been commenced, the petition was not allowed to stand over to have affidavits filed, but dismissed, with costs. *Ex parte Whalley*, 2 Mont. & Ayr. 723.

4. On a petition to reverse the adjudication copies of the depositions will not be granted till the hearing. *Ex parte Smith*, 2 Mont. & Ayr. 75.

5. On a petition to reverse the adjudication a reference made to the commissioner to put a new deposition as to the petitioning creditor's debt on the proceedings. *Ex parte Gartley*, 2 Mont. & Ayr. 524.

See EVIDENCE, 17.

### REVIEW OF TAXATION. See TAXATION, 24.

### REVIEWING CERTIFICATE. See CERTIFICATE, 13.



## DIGEST.

### SCANDAL.

1. A reference for scandal is on motion of course. Ex parte *Gomm*, 2 Mont. & Ayr. 512. S. C. 1 Dea. 566.

2. Affidavits referred for scandal on motion of course. Ex parte *Hetherington*, 4 Dea. & Ch. 217. S. C. 1 Mont. & Ayr. 607.

3. Any party, at any time, may apply to expunge scandal. Ex parte *Hetherington*, 4 Dea. & Ch. 217. S. C. 1 Mont. & Ayr. 607.

4. Defendant after putting in his answer became bankrupt. Plaintiff, before the assignees were brought before the Court, obtained an order to refer the answer for scandal and impertinence: Held, that the order was regulary obtained. *Booth v. Smith*, 5 Simon, 639.

See COSTS, 20.—MOTIONS.—PETITION.

### SECOND FIAT.

It is not of course to annul a second fiat against an uncertificated bankrupt, on the application of the assignees, &c. under the first. Ex parte *Devas*, 4 Dea. & Ch. 366. S. C. 1 Mont & Ayr. 420.

See FIAT, 11, 12.

### SECURITY FOR COSTS.

1. Where a defendant obtains security for costs, on the ground that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy. *Manley v. Mayne*, 3 Man. & Ry. 381.

2. An application for security for costs must be made before any step is taken by the party applying. Ex

parte *Tull*, 3 Dea. & Ch. 503. S. C. 1 Mont. & Ayr. 80.

See SUITS, 2.

### SEQUESTRATION.

A bankrupt sequestrator will be restrained from receiving any proceeds adversely to the assignees. Ex parte *Hall*, 2 Mont. & Ayr. 392. S. C. 1 Dea. 87.

### SERVANTS.

To entitle a servant to an allowance of six months' wages in full the hiring need not be for a year. Ex parte *Collyer*, 2 Mont. & Ayr. 29.

See CERTIFICATE, 1.—FIAT, *Effect of*, 4.—WAGES.

### SERVICE.

1. Where a petition is not served within the time for which it was answered, it must be re-answered. Ex parte *Hanks*, 2 Mont. & Ayr. 383.

On whom.

2. On a petition to annul a fiat on consent, under 6 Geo. 4. c. 16. ss. 133. 134., the assignees must be served. Ex parte *Race*, 2 Mont. & Ayr. 242.

3. A notice to produce the proceedings must be served on the assignees, not on the bankrupt. Ex parte *Daly*, 4 Dea. & Ch. 364.

4. If a fiat is impounded on the application of A., a petition for its delivery out, presented by B., must be served on A. Ex parte *Martin*, 2 Mont. & Ayr. 293.

5. If the commissioners certify that a consolidation will be beneficial, the assignees need not be served. Ex parte *Smith*, 2 Mont. & Ayr. 60.



## DIGEST.

### SERVICE—*continued.*

6. A petition to charge a solicitor who has retired from the partnership, in regard of partnership transactions, must be served on the continuing partner. *Ex parte Gould*, 2 Mont. & Ayr. 48.

#### *Nature of Service.*

7. A petition to annul need not be personally served on the assignees. *Ex parte Hanks*, 2 Mont. & Ayr. 383.

8. The affidavit on a motion for substituted service must state that the party wilfully keeps out of the way to avoid service, and is not to be found. *Ex parte Blandy*, 2 Mont. & Ayr. 24.

9. Service of order on assignee to elect to take or reject an agreement, substituted, on affidavit of his purposely keeping out of the way: *semble*, that service, substituted by order, is tantamount to personal service, *eo nomine*. *Ex parte Blandy*, 4 Dea. & Ch. 518.

10. The service of a petition to dismiss a petition for taxation of costs need not be personal; *secus* the order for payment of the costs. *Ex parte, Stephens*, 2 Mont. & Ayr. 482.

11. Where the solicitor to the bankrupt requests the solicitor to the petitioner to postpone the hearing of a petition to stay the certificate, and undertakes to serve it on the bankrupt, *semble*, the rule requiring personal service on the bankrupt does not apply. *Ex parte Hetherington*, 4 Dea. & Ch. 218. S. C. 1 Mont. & Ayr. 607.

*See ANSWERING.—ATTACHMENT, 4.*

#### *Affidavit of.*

12. When a petition stands over by arrangement, an affidavit of service

is not necessary. *Ex parte Ward*, 2 Mont. & Ayr. 391. S. C. 1 Dea. 86.

13. Service of petition to stay certificate not properly supported where affidavit merely states inability to serve bankrupt personally, but that bankrupt's solicitor had acknowledged bankrupt to be fully aware of petition and its nature. *Ex parte Levy*, 4 Dea. & Ch. 225.

### SET-OFF.

#### *What may be set off.*

1. A party can only set off such sums as can be made the subject of an action. Per Little Dale, J. *Field v. Bezant*, 5 Barn. & Adol. 358.

2. Where an attorney, defendant in assumpsit, sets off the amount of his bill, the plaintiff cannot deduct from that set-off costs of taxation allowed against the attorney pursuant to 2 Geo. 4. c. 23. s. 23. *Field v. Bezant*, 5 Barn. & Adol. 357.

3. In an action by assignees of a bankrupt against the defendant for not accepting bills of exchange (pursuant to an agreement with the defendant) in payment for goods sold and delivered by the bankrupt to the defendant: Held, that the latter might set off a debt due to him for money lent to the bankrupt before the bankruptcy. *Gibson v. Bell*, 1 Bing. (N. S.) 743. S. C. 1 Scott, 712.

4. The Court refused to allow the costs of a cause in another court, in which the plaintiff had been non-suited, to be set off against costs imposed by way of penalty upon the attorney for the defendant in this cause, for which costs on attachment had issued. *Dicas v. Warne*, 1 Scott, 584.

5. Where in trespass against A. and B. the verdict is for A. and against B., the costs of A. may be



## DIGEST.

### SET-OFF—*continued.*

set off against the costs payable by B., without regard to the lien of the plaintiff's attorney, although A. and B. plead separately, and appear by separate attorneys and counsel. *Lees v. Kendall*, 5 Nev. & Mann. 340.

#### *Evidence.*

6. Evidence of what passed in a conversation between the buyer and seller of goods at the time of the sale is admissible, notwithstanding it may tend to let in a set-off since barred by the statute of limitations. *Moore v. Strong*, 1 Scott, 367.

7. A defendant is not entitled to give evidence of a set-off under a notice of set-off delivered with the plea of *nunquam indebitatus*, since the rules of Hilary Term, 4 Will. 4.; and the Judges were not restrained by the proviso in the 3 & 4 Will. 4. c. 42. s. 1. from making the rule of Hilary Term 4 Will. 4. requiring that in all cases a set-off shall be pleaded. *Graham v. Partridge*, 1 Mee. & Wel. 395.

#### *Injunction.*

8. Where a creditor has a clear legal right of set-off in an action brought against him by the assignees, the Court will order the action to be stayed, and refer it to the commissioners to take the account, and state the balance. *Ex parte Clegg*, 3 Dea. & Ch. 505.

#### *Pleadings.*

9. To a count in debt by the assignees of a bankrupt for money had and received by the defendant to the use of the plaintiffs as assignees (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on

an account stated with the bankrupt before his bankruptcy: Held, that the plea was bad, for that it did not show that the debts were mutual. *Groom v. Mealey*, 2 Scott, 171. S. C. 2 Bing. (N. S.) 138.

#### *Principal and Agent.*

10. A factor sometimes sold goods consigned to him on his own account to pay advances, and he delivered an invoice in his own name. When he sold on account of his principals he sent a bought note. He sold some goods on his own account, and the principal brought an action against the vendees. The jury found that the vendee *bonâ fide* believed the broker sold to pay himself advances, and that, using the ordinary precaution of merchants, A. was not bound to make any further inquiry in an action by the vendor for the price of goods: Held, that the vendee was entitled to set off the payments made to the factor. *Warner v. M'Kay*, 1 Crompt. & Wel. 591.

See ALLOWANCE TO BANKRUPT, 2.  
—Costs, 21.

### SHARES IN COMPANIES.

See REPUTED OWNERSHIP, 9 to 17.  
23 to 27.

### SHERIFF.

A fiat issued against a defendant after his goods had been taken in execution by the sheriff; the assignees and the sheriff made an agreement as to disposal of the goods: Held, the bankrupt's right to surplus did not give him sufficient right to compel the sheriff to return a *fi. fa.* *Gilbert v. Whalley*, 1 Tyrw. & Grainger, 189.

See ACTIONS AGAINST SHERIFF.—  
INTERPLEADER ACT.



## DIGEST.

### SIGNATURE.

See CERTIFICATE, 21, 22, 23.—  
PETITION.

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### SINE DIE, ADJOURNMENT.

See ALLOWANCE TO BANKRUPT, 3.

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### SLAVES.

See EQUITABLE MORTGAGE.

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### SOLICITOR.

1. The solicitor cannot in bankruptcy compel the assignees to pay his bill if they have no assets. Ex parte *Adams*, 2 Mont. & Ayr. 706. See contra, ex parte *Coates*, 1 Mont. & Ayr. 328; and ex parte *Lewis*, 3 Dea. & Ch. 681.

2. On an agreement for dissolution of a partnership between two solicitors, the remaining partner agreed to pay the partnership debts; the assignees, knowing this agreement, continued to employ the remaining partner: Held, the Court would not on the application of the assignees interfere to charge the outgoing partner; a petition for this purpose must be served on the continuing partner. Ex parte *Gould*, 2 Mont. & Ayr. 48. S. C. 4 Dea. & Ch. 547.

3. The solicitor to the fiat must bear any expense which his neglect would cause the estate; thus, where the solicitor to the commission prepared and charged for an assignment to the assignees, which he neglected to get properly executed, he is bound to remedy this defect at his own costs. Ex parte *Bennett*, 2 Mont. & Ayr. 308. S. C. 1 Dea. 70.

4. A solicitor cannot receive a deposit of title deeds as security for

future bills. Ex parte *Laing*, 2 Mont. & Ayr. 381.

See ASSIGNEES, 11. — ATTORNEY.  
—BIDDINGS, 1.—BILL OF COSTS.  
—DIVIDENDS, 8.—EVIDENCE, 18, 19.

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### SPECIFIC PERFORMANCE.

1. Upon a sale of the bankrupt's mortgaged property made under the general order, the Court of Review has jurisdiction to enforce a specific performance of the contract by the purchaser. A purchaser, who with full knowledge of certain objections to the title, granted a lease of the property to a third person, was held to have waived the objections to the title. Ex parte *Sidebotham*, 3 Dea. & Ch. 819.

2. The Court of Review has jurisdiction to decree specific performance of an agreement to purchase mortgaged premises sold before the commissioners under Lord Loughborough's general order. Ex parte *Barrington*, 2 Mont. & Ayr. 245. S. C. 1 Dea. 3. confirming ex parte *Sidebottom*, 1 Mont. & Ayr. 655. S. C. 4 Dea. & Ch. 461.

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### SPECIAL CASE.

After a special case has once been certified by a judge, the Court has no jurisdiction to disallow it. Ex parte *Hawley*, 3 Dea. & Ch. 655.

See APPEAL.—COSTS, 22, 23.

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### STAMP.

See PROOF, 29.

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### STANDING OVER.

1. A petition not to stand over to answer affidavits when there is laches. Ex parte *Sidebottom*, 2 Mont. & Ayr. 79.



## DIGEST.

### STANDING OVER—*continued.*

2. Application for petition to stand over should be made the day before the petition appears in the paper. Ex parte *Telfourd*, 2 Mont. & Ayr. 389.

See AFFIDAVITS, 2.

### STATUTES.

The 127th section of 6 Geo. 4. c. 16. is retrospective. Ex parte *Hawley*, 2 Mont. & Ayr. 436.

### STATUTE OF LIMITATIONS.

See DEBT PROVEABLE, 2.—EXPUNGING PROOF, 2.—PROOF, 55.

### STAYING ADVERTISEMENT.

On application by the bankrupt to stay the advertisement in the gazette on his own affidavit merely denying the existence of the petitioning creditor's debt, on the committal of any act of bankruptcy without any allegation of his solvency, will not be entertained unless the proceedings are produced for the inspection of the court. Ex parte *Pownall*, 3 Dea. & Ch. 723.

### STAYING CERTIFICATE.

See CERTIFICATE, 5 to 16.

### STOPPAGE IN TRANSITU.

1. To defeat the right of stoppage in transitu one of two things must appear, either the goods must arrive at the natural end of their journey, in which case I should rather think the intention of the vendee had nothing to do with the question, or if the transitus is to be

put an end to by something intermediate, then it is natural to consider what that was, and with what intention it was done. Per Alderson, B. *James v. Griffin*, 3 Cr., Mee., & Ros. 30.

2. I can conceive a case in which receiving goods into his own warehouse would not be a receiving into his own possession, as where, knowing his bankruptcy to be inevitable, he puts them apart from his other goods for the purpose of restoring them to the vendor. Per Abinger, C. B. *James v. Griffin*, 3 Cr., Mee., & Ros. 28.

3. Goods were consigned to A. in London; on arrival of the goods in the river the captains are urgent to unload, but A., who knew himself to be insolvent, at first refused to give directions, but ultimately, to accommodate the captain, gave his (A.'s) son a verbal order to land the goods at a wharf where he had been in the habit of landing goods under written orders, at the same time stating he would not take the goods. A. had no premises of his own on the river, but had warehouses in the city; the goods were landed accordingly, and while in the hands of the wharfingers were stopped in transitu, and A. became bankrupt: In an action by the assignees against the wharfingers, Held, the proper question for the jury was, whether the wharfingers took possession for A. as owner, or for the benefit of the owner, and that the declaration by A. to his son was admissible in evidence though not communicated to the wharfinger or vendor. *James v. Griffin*, 1 Tyrw. & Grainger, 449. S. C. 3 Cr., Mee., & Ros., 20.

4. The unpaid vendor of goods remaining in his own warehouse rent-free may stop in transitu, although he has given the vendee a



## DIGEST.

### STOPPAGE IN TRANSITU— *continued.*

delivery order, under which part of the goods have been removed. But such unpaid vendor is not the true owner of the goods within the 72d section of the bankrupt act so as to give an indefeasible property to the assignees of the vendee as goods in his possession, order, and disposition, with the consent of the true owner. *Townley v. Crump*, 5 Nev. & Mann. 606.

5. Where a vendor ships goods for the vendee, and sends him the bill of lading, which he indorses to a third person, the vendor cannot stop in transitu. *Re Westzinthus*, 5 Barn. & Adol. 817.

6. Where a vendor ships goods for a vendee and sends him a bill of lading, which he indorses to a third party, as security for advances, and becomes bankrupt, and the vendor unsuccessfully claims the goods of the master of the ship: Held, in equity, the vendor by his attempted stoppage in transitu acquired a right subject to the lien of the third party. *Re Westzinthus*, 5 Barn. & Adol. 817.

7. Goods being received by the general shipping agent of the vendee from a carrier, and by the agent shipped for their final destination, does not prevent stoppage in transitu. *Slater v. Le Feuvre*, 7 Carr. & Pay. 91. S. C. 2 Scott, 146. S. C. 2 Bing. 81.

8. A person having sold ten casks of goods to N. sent them to wharfingers, with notice that they were for N. and ordering them to separate them from other goods sent at the same time; N. took away two of the casks, after which the vendor desired the wharfingers to deliver the other eight to another person, which was done. *Quære*, as to this

right to stoppage in transitu? Semble, it existed, but the case turned on another point. *Betts v. Drewe*, 2 Adol. & Ellis, 57.

9. A vendor desired wharfingers to stop in transitu, and promised to indemnify them for so doing, and they did stop: Held, whether the right to stop exists or not; the act is not such an evidently unlawful act, as entitled the vendor to resist an action by the wharfingers under this indemnity, they having been compelled to pay damages to the assignees of the vendee for stopping. *Betts v. Drewe*, 2 Adol. & Ellis, 57.

### STRIKING OFF ROLL.

Though the rule of another Court for striking an attorney off the roll be produced, semble, an order nisi only can be obtained in the Court of Review in the first instance. *In re Mark*, 4 Dea. & Ch. 482.

### SUB-DIVISION COURT.

*See COMMITMENT*, 1.

### SUBSTITUTION OF PETITIONING CREDITOR'S DEBT.

1. On a petition for the substitution of a debt in lieu of the petitioning creditor's debt under the 6 Geo. 4. c. 16. s. 18. the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne* 4 Dea. & Ch. 403.

2. On a petition by assignees to expunge a proof, the examination of the bankrupt before the commissioner, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman*, 4 Dea. & Ch. 405.

3. If the petitioning creditor pay a bill which he accepted for the bankrupt's accommodation after it



## DIGEST.

### SUBSTITUTION OF PETITION- ING CREDITOR'S DEBT— *continued.*

has been proved by the holder, he may use the name of the proving creditor as a substitute for his own insufficient debt. *Ex parte Rogers*, 2 Mont. & Ayr. 153. S. C. 4 Dea. & Ch. 628.

4. If it appears that the original debt was proved under a mistake in law and was reduced on legal grounds and without fraud, the costs shall come out of the estate; but *secus*, if the application to substitute is by the original petitioning creditor, though he comes to substitute even under such circumstances in *autre droit*. *Ex parte Rogers*, 4 Dea. & Ch. 637.

### SUBSTITUTED SERVICE. *See SERVICE*, 8, 9.

### SUITS.

1. Assignees are bound to carry on beneficial suits; if they decline they may be removed. They may apply to the Court for directions how to act. *Ex parte Philips*, 2 Mont. & Ayr. 530.

2. The Court refused at the instance of the plaintiff to allow a demurrer to be struck out of the paper, on the ground that since it had been set down the defendant had become bankrupt and his assignees refused to take up the defence or to give security for costs. *Ex parte Flight*, 2 Scott, 224.

3. The consent of the creditors of a bankrupt to the institution of a suit by the assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith v. Biggs*, 5 Simons, 391.

*See SCANDAL*, 4.

### SURETY.

*See PRINCIPAL AND SURETY.—*  
*PROOF*, 49, 50.

### SURRENDER.

Where a true bill for felony in non-surrendering has been found against the bankrupt, the Court will not order a meeting to be held for his surrender. *Ex parte Levi*, 2 Mont. & Ayr. 686.

*See ANNULING*, 7, 8, 9.—*Costs*, 24.

### SWEARING AFFIDAVITS.

*See AFFIDAVITS*, 1, 2.

### TAXATION.

#### *Jurisdiction.*

1. The Court has a general jurisdiction to refer bills for taxation, independently of the acts of parliament. *Ex parte Copeland*, 4 Dea. & Ch. 86.

2. The Court of C.P. has no common law power to refer an attorney's bill for taxation. An attorney's bill containing charges for searching for judgments is not therefore taxable under the 2 Geo. 2. c. 23. *Ex parte Bowles*, 1 Scott, 583.

#### *Who may apply.*

3. Where there are three petitioning creditors, one may petition to tax their solicitor's bill. *Ex parte Watts*, 2 Mont. & Ayr. 621.

4. It is a matter of course for any creditor who has proved for 20*l.* to apply, within a reasonable time, under 6 Geo. 4. c. 16. s. 14. for a re-taxation. *Ex parte Christy*, 4 Dea. & Ch. 414.

#### *What Bills are taxable.*

5. If an attorney who is not admitted in the Court of Bankruptcy employs an agent who is admitted



## DIGEST.

### TAXATION—continued.

to strike a docket, and, after payment of the agent by the official assignee, the attorney, who is the principal, delivers a bill with charges for striking the docket, it is taxable. Ex parte *Cass*, 2 Mont. & Ayr. 170. S. C. 4 Dea. & Ch. 273.

6. Solicitors' bills, though allowed by commissioners, and paid by assignees, ordered to be taxed, where objectionable items pointed out, on petition of creditors. Ex parte *Jourdain*, 3 Dea. & Ch. 637.

7. On a petition by creditors to tax the bills of several solicitors who had been successively employed by the assignees, the Court made the order as prayed, notwithstanding the bills had been previously taxed by the commissioners, and paid by the assignees. Ex parte *Brown*, 3 Dea. & Ch. 496.

8. Where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will tax though some time has elapsed. Ex parte *Christy*, 4 Dea. & Ch. 414.

9. If a solicitor retains money received by him in his character of solicitor for the use of his client, his bill is taxable though it contains no charges for business done in a court of law or equity. Items in a solicitor's bill for preparing and settling a bill in equity will render the solicitor's bill taxable though the bill in equity was never filed, *semble*. In re *Barker*, 6 Simon, 476.

10. An item for attending a mortgagee summoned to attend before a commissioner makes the whole bill taxable. Ex parte *Williams*, 2 Mont. & Ayr. 578.

See COSTS, *Taxation*, 25.—SET-OFF, 2. 4, 5.

### Form of Petition.

11. Where the amount of a bill appears on the face of it excessive, objectionable items need not be pointed out on a petition to tax. Ex parte *Copeland*, 4 Dea. & Ch. 86.

12. Bill taxed by commissioners and paid, ordered to be taxed, objectionable items being pointed out. Ex parte *Jourdain*, 3 Dea. & Ch. 637. S. P. ex parte *Brown*, 3 Dea. & Ch. 496.

13. On an application to the general jurisdiction, after some time has elapsed, objectionable items must be pointed out. Ex parte *Christy*, 4 Dea. & Ch. 414.

### Costs.

14. Though the 2 Geo. 2. c. 23. s. 23. enacts that when a bill is reduced less than one sixth, costs are in the "discretion" of the Court, yet the proper course in the King's Bench is to charge the client. Per Taunton and Williams, Js.—Little-dale, dub. *Mills v. Revett*, 1 Adol. & Ellis, 856.

15. If in taxation of an attorney's bill in the King's Bench between attorney and client the master strike off whole items because the client is not the party liable, these items are excluded from the calculation as to one-sixth being struck off. *Mills v. Revett*, 1 Adol. & Ellis, 856.

16. The assignees of a bankrupt solicitor are not liable to pay the costs of taxation of his bill where more than one sixth is taxed off. *Willasey v. Masheter*, 3 Myl. & Kee. 293.

17. The Court will order a solicitor's bill to be taxed though he has commenced an action, but the petitioner must pay the costs of the action. Ex parte *Watts*, 2 Mont. & Ayr. 621.



## DIGEST.

### TAXATION—continued.

18. Where more than one sixth is taxed off the bills of a bankrupt solicitor the costs do not fall on his assignees. *Alsop v. Lord Oxford*, 1 Myl. & Craig, 26. And see in re *Cole*, 2 Sim. & Stu. 463, and *Weston v. Pool*, 2 Strange, 1056.

#### Practice.

19. Upon an application, on further directions, for costs of taxation, more than one sixth having been taxed off, objections cannot be made to the taxation. Ex parte *Millington*, 1 Dea. 114.

#### Time.

20. After a solicitor's bill has been taxed and paid six years it cannot be re-taxed without special reasons. Ex parte *Hutchinson*, 2 Mont. & Ayr. 35. S. C. 4 Dea. & Ch. 530.

21. It is a matter of course for any creditor who has proved to the amount of 20*l.* to apply within a reasonable time under the 14th section of 6 Geo. 4. c. 16., for a re-taxation of any bill of the solicitor to the commission, but not where a period of three years has been suffered to elapse after payment of such bill. Ex parte *Christy*, 4 Dea. & Ch. 414.

22. But the above rule as to time would not apply, when the application is under the general jurisdiction, and objectionable items pointed out. Ex parte *Christy*, 4 Dea. & Ch. 414.

23. Where nearly six years had elapsed since the solicitor's bill of costs had been taxed by the commissioners, and the assignee was a party to that taxation and to the subsequent payments in discharge of the bills, the Court refused on his application to refer them for re-

taxation. Ex parte *Hutchinson*, 3 Dea. & Ch. 829.

#### Review of Taxation.

24. An application that the officer of the Court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application that the amount of the taxed costs has not been paid into Court, though it may be proper to make such payment one of the terms of the order for re-taxation. Ex parte *Richardson*, 3 Dea. & Ch. 735.

### TENDER.

See PETITIONING CREDITOR.

### TITLE OF PETITION.

See LORD CHANCELLOR.

### TRADER.

1. A builder is a person who builds on his own or another's land for profit. Ex parte *Neirincks*, 2 Mont. & Ayr. 384. S. C. 1 Dea. 79.

2. What is not sufficient evidence of a trading by bill broking. Ex parte *Box*, 2 Mont. & Ayr. 593.

3. A lodging-house keeper not proved to have sold provisions is not a trader. Ex parte *Wilks*, 2 Mont. & Ayr. 667.

4. A coach proprietor is not a trader, *semble*. Re *Walker*, 2 Mont. & Ayr.

5. One single instance of trading insufficient, when intent to trade generally is not proved. Ex parte *Wilks*, 2 Mont. & Ayr. 167.

6. Single act of buying and selling by farmer, with evidence of intent to continue, sufficient trading to support fiat. Ex parte *Lavender*, 4 Dea. & Ch. 487.



## DIGEST.

### TRAVELLING EXPENSES.

See ASSIGNEES, 6, 7.

### TRAVELLING FEES.

See FEES.

### TRUSTEE.

1. Where a trustee becomes bankrupt, the general rule is that the Court will not appoint a new trustee under 6 Geo. 4. c. 16. s. 79. without a reference, unless all parties are before the Court. The smallness of the estate may furnish an exception. Ex parte *Whish*, 2 Mont. & Ayr. 215.

2. If a trustee become bankrupt the Court will appoint a new trustee, without a reference, if there be an affidavit of solvency, fitness, &c. Ex parte *Walton*, 2 Mont. & Ayr. 242.

3. A new trustee appointed without a reference to the registrar, on an affidavit of the fitness of the proposed trustee. Ex parte *Beveridge*, 4 Dea. & Ch. 455.

See JURISDICTION, 9. — REPUTED OWNERSHIP, 12. 30 to 33.

### TWENTY PER CENT.

See ASSIGNEES, *Twenty per Cent.*, 23.

### UNCERTIFICATED BANKRUPT.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus. Ex parte *Ryley*, 4 Dea. & Ch. 50.

### UNCLAIMED DIVIDENDS.

1. The Court of Review has no jurisdiction to order distribution of

unclaimed dividends, but can order distribution to creditors claiming. In re *Pocklington*, 2 Mont. & Ayr. 729. S. C. 1 Dea. 335. S. P. ex parte *Bremidge*, 2 Mont. & Ayr. 732. S. P. ex parte *Bell*, 2 Mont. & Ayr. 733.

2. But where the Court had made an order for distribution of unclaimed dividends before the 5 & 6 W. 4. c. 29. passed, the commissioner may proceed to distribute after the passing of the act. Ex parte *Curtis*, 2 Mont. & Ayr. 732.

3. The interest made by the investment of unclaimed dividends does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends. Ex parte *Renshaw*, 4 Dea. & Ch. 483.

4. After an order was made for the distribution of unclaimed dividends fresh assets came to the hands of the assignees, which enabled them to make a further dividend: Held, that the further dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividends, unless in the interim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors; but the commissioners ought not out of the further assets to lay aside a sum equivalent to the unclaimed dividends already divided as a fund in reserve to meet any future renewal of the proofs. Ex parte *Mowbray*, 3 Dea. & Ch. 552.

### USURY.

1. The statute 3 & 4 W. 4. c. 98. s. 7., which protects bills of exchange payable at three months or less from the operation of the usury laws, extends also to warrants of



## DIGEST.

### USURY—continued.

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attorney given to secure payments of such bills. *Connops v. Meaks*, 2 Adol. & Ellis, part 2, 326.

2. A loan on bills of three months on which more than five per cent. interest is allowed is not taken out of 3 & 4 W. 4. c. 93. s. 7. by taking collateral security. Ex parte *Knight*, 2 Mont. & Ayr. 568.

3. A customer applied to his bankers to lend him 4,000*l.* at five per cent., which the bankers agreed to. He then asked the bankers what balance he was expected to keep with them; they answered he could not keep less than 10,000*l.*; upon which the customer said, "Very well, they might leave it to him." The customer paid into and drew out from the banking-house in one year various sums, amounting to 108,000*l.*: Held, that under these circumstances the loan was not usurious. Ex parte *Patrick*, 3 Dea. & Ch. 638.

See ANNULING, 13.

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### VACATING ASSIGNMENT.

See ASSIGNEES, 2.

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### VARYING MINUTES.

1. Minutes of an order can only be varied where there is some mistake or misunderstanding on the part of the officer. Ex parte *Soper*, 2 Mont. & Ayr. 58. S. C. 4 Dea. & Ch. 275.

2. Substantial variations in order cannot be effected by motion, but only on petition to re-hear. Ex parte *Soper*, 4 Dea. & Ch. 569.

3. A notice of motion to vary minutes does not prevent their being drawn up. Ex parte *Bell*, 2 Mont. & Ayr. 578.

### VENDORS' LIEN.

See LIEN, 13 to 18.

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### VIVA VOCE EXAMINATIONS.

See EVIDENCE, 20 to 25.

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### VOLUNTARY ASSIGNMENTS AND CONVEYANCES.

1. To make a deposit void two things must concur; it must have been made by the bankrupt voluntarily, and also in contemplation of bankruptcy. Per Littledale, J. *Morgan v. Brundrett*, 5 Barn. & Adol. 296.

2. The late cases, with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they ought. Per Littledale and Pattison, Js. *Morgan v. Brundrett*, 5 Barn. & Adol. 296.

3. The meaning of the words "contemplation of bankruptcy," I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission. Per Park, J. *Morgan v. Brundrett*, 5 Barn. & Adol. 296.

4. The recent cases have gone too great a length: they seem to have proceeded on the principle, that if a party be insolvent at the time when he makes a payment or delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent, yet not contemplate bankruptcy. Per Pattison, J. *Morgan v. Brundrett*, 5 Barn. & Adol. 297.

5. In order to support a security made by an insolvent to a creditor



## DIGEST.

### VOLUNTARY ASSIGNMENTS AND CONVEYANCES—*cont.*

within three months before he is committed to prison, it is not necessary for the latter to prove pressure by him of the insolvent. It is for the assignees of the insolvent, who seek to avoid the security under the provisions of the 7 Geo. 4. c. 57. s. 32., to make out that it was the voluntary act of the insolvent. *Doe v. Gillett*, 1 Tyr. & Graing. 104.

6. A father gave his bond to his son for money lent: the son assigned the bond to trustees of his marriage settlement; afterwards the son applied to the father to assign to the trustees a house and furniture, in part satisfaction of the bond debt. He was then in a state of considerable embarrassment, and soon after stopped payment. In an action by the assignees to recover the property, on the ground that the assignment was voluntary, and in contemplation of bankruptcy, it was left to the jury, 1. Whether the assignment was spontaneous to prefer the son to the prejudice of the other creditors? 2. Whether he was in such a state at the time that he must have known or had reason to suppose that bankruptcy was inevitable? The jury found for the defendants, affirming the validity of the transfer, and the Court refused to disturb the verdict. *Belcher v. Prittee*, 4 Moo. & Sc. 295.

7. To set aside an assignment of a policy of assurance and some plate as voluntary, the plaintiff must prove, not merely insolvency, but also that bankruptcy was contemplated. *Morgan v. Brundrett*, 5 Barn. & Adol. 289.

8. An assignment by a debtor, he being at the time in a state of insolvency of all his property for the

benefit of all his creditors, is not void within the meaning of the 7 Geo. 4. c. 57. s. 32. *Dubitante*, Alderson, B. *Davies v. Acocks*, 2 Cr., Mee., & Ros. 461.

9. An insolvent person being in prison endeavoured to make terms with his creditors, they proposing that he should execute a composition deed for their benefit, which he at first refused. Subsequently a letter was written by an agent of the creditors, stating that they would not consent to his discharge, and that he must either execute an assignment or be made a bankrupt. The insolvent, after taking three days to deliberate upon it, with great reluctance executed the assignment. Held, that this was not a voluntary conveyance within the above section of the insolvent act. *Davies v. Acocks*, 2 Crompt. & Ros. 461.

### WAGES.

Under the 6 Geo. 4. c. 16. s. 48. it is not requisite to prove a hiring for a year certain; but it must be something more than a mere hiring by the week; *ex parte Skinner*, Mont. & Bli. 417. corrected. *Ex parte Collier*, 4 Dea. & Ch. 520.

See CERTIFICATE, 1.—SERVANTS.

### WARRANT.

1. Where a warrant is issued against a bankrupt for non-compliance with an order of the Court, and the warrant is lost, the Court will renew the warrant or grant a copy of it as a matter of course. *Ex parte Giles*, 3 Dea. & Ch. 620.

2. A commissioner's warrant, directed "To J. A. and W. S., our messengers and their assistants," does not justify the apprehension



## DIGEST.

### WARRANT—continued.

of the bankrupt by any one not in the presence, actual or constructive, of J. A. or W. S.; and therefore B., who is an assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt in the absence of W. S. and J. A., though he has the warrant in his possession. *Rex v. Whalley*, 7 Carr & Pay. 245.

3. Held also, if B., in attempting to take the bankrupt, be struck down by him with a stone, and in a struggle which ensued have part of his nose bitten off by the bankrupt, this, if death ensue in B., would be manslaughter only. *Ib. id.*

### WIFE'S PROPERTY.

1. The Court can order the wife an allowance out of real estates. A reference may be made to the registrar to report as to amount. The Court can itself decide the amount. The whole income is not to be given, 200*l.* out of 247*l.*, or 175*l.* out of 225*l.*, is a fair allowance; order made from date of fiat. *Ex parte Thompson v. Cater*, 2 Mont. & Ayr. 505.

2. By will the father-in-law of the bankrupt gave 4,000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6,000*l.* on bond, declared that so much of the debt on the

bond as remained unpaid in the testator's life-time should go in redemption and satisfaction of the above bequest of 4,000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1,069*l.*, part of the 6,000*l.* bond debt, was paid off and invested in the funds. By the terms of a devise the interest of a sum was payable to a bankrupt for life, remainder to his children; the trustees (of which the bankrupt was one) were authorized to lend the principal to the bankrupt firm, which they did: On bankruptcy and proof against the firm, Held, the dividend on the proof should be invested in stock, the interest of which was to accumulate in the first instance till the principal sum was made good again. *Ex parte King*, 2 Mont. & Ayr. 410.

3. Furniture, the separate property of the wife, does not pass to the assignees under a fiat against the husband. *Ex parte Elliston* 2 Mont. & Ayr. 365.

4. On petition of the assignees claiming to be entitled to the interest of the 1,069*l.*, the wife being dead, Held (Sir J. Cross diss.) that, until the 4,000*l.* should be made up, the 1,069*l.* should accumulate; after which the assignees were declared entitled to the interest for the bankrupt's life. *Ex parte Young*, 4 Dea. & Ch. 645.

See PROOF 56 to 59.—PROPERTY PASSING TO ASSIGNEES, 13, 14.—REPUTED OWNERSHIP, 34.



## APPENDIX A.

(*Referred to in page 83, ante.*)

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THERE have been three cases, viz. *ex parte* Wardell and *ex parte* Hercy, Cooke, 181, and *ex parte* Badger, 4 Ves. 165, from which it has been supposed that a mortgagee, when the security is insufficient, is not entitled to apply the proceeds first to the payment of the interest accrued subsequent to the fiat. How far the cases warrant this doctrine, and, if they did, how far it is tenable, the cases themselves, and a moment's consideration of the principle, will determine. Extracts of the cases from the books at the Bankrupt Office are subjoined. As to the principle, it seems sufficient to say, that a creditor, who has a security, where one debt is proveable and the other is not proveable, has always been supposed to be entitled to apply his security to the debt which he cannot prove; and it seems extraordinary to have been supposed, if it ever were supposed, that a mortgagee was to be in a worse situation because his security was insufficient.

“ Thursday, 29th March 1787.

“ *Lord Chancellor.*—Whereas James Wardell, a mortgagee of the said bankrupt's estate, did prefer his petition to me, showing that the said bankrupt, being indebted to the petitioner in the several sums of 700*l.* and 200*l.*, did, for securing the repayment thereof, with lawful interest for the same, duly surrender certain copyhold premises to the use and behoof of the petitioner, by way of mortgage, for the said sums of 700*l.* and 200*l.*, and interest, to the petitioner as aforesaid; that a commission was issued against Dyer; that the said mortgaged premises were an insufficient security for the



said principal monies and the interest due thereon, and, if sold, would not produce sufficient to satisfy the same ; and therefore praying, that the mortgaged premises be sold, and that the money arising thereby might be ordered to be paid to the petitioner towards satisfaction of the principal money and interest due and to grow due on the said mortgage, together with the petitioner's costs, and that the petitioner might be at liberty to prove the remainder: Now, upon hearing the said petition and the affidavit of James Wardell read, and upon hearing what was alleged by the counsel for the said petitioner, no person appearing for the assignees, I do order, that it be referred to the commissioners to take an account of the principal and interest due to the petitioner, and to tax him his costs, and that the commissioners do, on taking such account, distinguish what interest incurred after the bankruptcy of the said John Dyer : And I do order, that the estate be sold, before the said commissioners, under the said commission, and that the monies to arise from the sale be applied in payment of what shall be so found due to the petitioner for principal and interest and costs ; and in case the same shall be insufficient for the payment of the principal, and of the interest to the time of the bankruptcy, and also of the costs, let the petitioner be admitted a creditor under the said commission for the deficiency of what shall be found due to him for principal and interest to the time of the bankruptcy only, and for his costs, and be paid a dividend or dividends in respect thereof rateably and in equal proportion with the rest of creditors seeking relief under the said commission, but so as not to disturb any dividend already made."

" Saturday, 10th November 1792.

" In the matter of James West, a bankrupt, the petition of Hercy and Bird sheweth, that James West was indebted to them, by mortgage to Chambers in trust for the petitioners, of all that piece or parcel of ground, &c. now in the occupation of — Osborne ; that Chambers assigned the



legal interest in the premises to the petitioners; that West assigned to the petitioners, as further security, a bond from one Hoissard; the petitioners, about the year 1781, entered into possession of the said mortgaged premises, and have been since in the receipt of the rents and profits thereof; that on or about the 31st day of May 1783 a commission of bankrupt was issued against West; that the property of West being wholly in the East Indies, nothing was collected until very lately, when a remittance came to the assignees, and on the 24th day of July 1792 a dividend of 18s. in the pound was declared; that there is now due to the petitioners, for principal and interest, the sum of 1,640*l.* or thereabouts; and therefore praying, that the said mortgaged premises might be sold, and that what should arise from the sale thereof, after deducting the expenses of the said sale and the costs of this application, might be paid to the petitioners in satisfaction of their said debt, so far as the same would extend, and that the petitioners might be at liberty to prove the remainder of their said debt under the commission: Whereupon the counsel for the petitioners and also for the assignees being heard, We do order, that the commissioners take an account of the principal and interest due to the petitioners, and to tax them their costs, and also an account of the rents and profits of the mortgaged premises received by the petitioners; in taking of which last-mentioned account the commissioners are to make unto the petitioners all just allowances: And we do further order, that the commissioners do, in taking the account of principal and interest, distinguish what interest accrued after the bankruptcy of the said James West: And we do further order, that the said mortgaged premises be sold, and that the monies to arise from the sale be applied in payment of what shall be found due to the petitioners for principal, interest, and costs; and in case the same shall be insufficient for the payment of the principal, and of the interest to the time of the bankruptcy, and also of the costs, let the petitioners be



## APPENDIX.

admitted creditors for the deficiency of what shall be found due to them for principal and interest to the time of the bankruptcy only, and for their costs, and be paid a dividend or dividends in respect thereof, rateably and in equal proportion with the rest of the creditors of the said bankrupt seeking relief under the said commission.

JA. EYRE, C. S.

W. H. ASHURST, C. S."

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3 & 4 W. 4. c. 84. s. 9.

" And whereas the office of clerk of the inrolments in bankruptcy is by the said recited act (2 & 3 W. 4. c. 111.) also directed to cease as therein specified, but power to re-appoint to the said office is given by the act next herein mentioned; be it enacted, that the said office shall and may continue and be in force, and that fit and proper persons may be, from time to time, appointed to the same, with all the powers, authorities, duties, fees, rights, and privileges given to or imposed upon the said office by an act passed in the second and third years of the reign of his present Majesty, intituled ' An act to amend the laws relating to bankrupts;' any thing in the said first-recited act to the contrary thereof notwithstanding."

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## APPENDIX B.

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5 & 6 Gul. IV. Cap. 29.

*An Act for investing in Government Securities a portion of the cash lying unemployed in the Bank of England belonging to bankrupts estates, and applying the interest thereon in discharge of the expences of the Court of Bankruptcy, and for the relief of the suitors in the said Court ; and for removing doubts as to the extent of the powers of the Court of Review and of the Subdivision Courts.*

[21st August 1835.]

**W**HEREAS by an act passed in the first and second years of the reign of his present Majesty, intituled “ An act to establish a Court in Bankruptcy,” it was enacted, that it should be lawful for his Majesty, his heirs and successors, to establish a court of judicature, which should be called “ The Court of Bankruptcy,” and to appoint judges, commissioners, and other officers of the said court; and that it should be lawful for the lord chancellor to choose official assignees to act in all bankruptcies prosecuted in the said court, and to collect the effects of bankrupts, and to pay the proceeds thereof into the bank of *England* to the credit of the accountant general of the high court of chancery, subject to the order of the lord high chancellor, or the said court or any judge thereof, as therein mentioned; and it was further enacted, that certain fees and sums of money specified in the said act should be received by the lord chancellor’s secretary of bankrupts, and paid by him into the bank of *England*, to the credit of the said accountant general, to an account to be intituled “ The secretary of bankrupts account,” and that

1 & 2 W. 4. c. 56.



## APPENDIX.

there should be paid out of the monies standing to that account certain yearly sums specified in the said act as and for salaries to the judges and other officers of the said court for the time being; and it was further enacted by the said act, that certain annuities, the amount thereof to be ascertained and certified as in the said act is mentioned, should be respectively paid to the patentee for the execution of the laws and statutes concerning bankrupts, to certain persons then acting as commissioners of bankrupt in *London*, and to certain officers of the lord chancellor and of the high court of chancery mentioned in the said act, in lieu of and as compensation for certain fees and emoluments accustomed to be received by them, and which would by the provisions of the said act be wholly discontinued and abolished, out of the monies and securities standing to an account to be opened by the said accountant general, to be intituled "The secretary of bankrupts compensation account;" and that certain fees and sums of money specified by the said act should be paid by the said official assignees into the bank of *England* to the credit of the said accountant general, to be carried to the said accounts respectively: And whereas his Majesty did, by virtue and in pursuance of the said act, establish the said court of bankruptcy, and did appoint judges and commissioners and registrars and deputy registrars of the said court: And whereas official assignees have been chosen by the lord chancellor to act in bankruptcies as aforesaid: And whereas the amount of certain annuities have been duly ascertained and certified, in pursuance of the said act, to be due and payable to the persons therein mentioned, in lieu of the fees and emoluments aforesaid: And whereas an account has been opened in the bank of *England* by the said accountant general, intituled "The secretary of bankrupts account," and another account has been opened in the bank of *England* by the said accountant general, intituled "The secretary of bankrupts compensation account:" And whereas the said official assignees have paid into the bank of *England* in the name of the said accountant general divers large sums of money, which have been placed to the credit



of the several bankrupts estates: And whereas there now is and has been for a long time a very large sum of money belonging to bankrupts estates, or to suitors in matters of bankruptcy, standing in the name of the said accountant general, which lies dead and unemployed in the said bank of *England*: And whereas it was necessary for the said accountant general to appoint certain persons to act as clerks in the performance and execution of the duties imposed upon him by the said act; but no provision is made by the said act for the salaries of the said clerks and the other expences necessarily incident to the performance of the said duties, other than out of certain fees directed to be paid to the chief registrar of the said court: And whereas the business arising from the duties imposed upon the said accountant general by the said act is gradually increasing, and the present establishment of clerks is likely to become inadequate to transact the same with that accuracy and despatch which is necessary for the public service: And whereas the payment of the fees authorized by the said act, or a part thereof, will become unnecessary, and the same may be discontinued if another fund is provided for the payments now made out of the said fees by the authority of the said act: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that out of the cash belonging to the estates of bankrupts, or to suitors in matters of bankruptcy, that now lies or shall hereafter lie dead and uninvested on securities in the bank of *England*, in the name of the said accountant general, or of the accountant in bankruptcy hereafter mentioned, any sum or sums not exceeding in the whole the sum of three hundred thousand pounds shall and may, by virtue of any order or orders of the lord high chancellor to be made for that purpose, from time to time be placed out in one entire sum or in parcels, in the name of the said accountant general or of the said accountant in bankruptcy, after the appointment of the said last-mentioned accountant, on such government or parliamentary securities as

Part of the money in the bank belonging to bankrupts estates to be carried to an account to be called "The bankruptcy fund account."



## APPENDIX.

in and by such order or orders shall be directed; and such securities shall be carried to an account to be intituled "The bankruptcy fund account," subject to such rules and orders as the lord high chancellor shall think fit to prescribe for the purposes herein mentioned.

Sum advanced  
to credit of  
bankrupts  
compensation  
account to be  
repaid by order  
of lord chancellor.

II. And whereas the monies and securities standing to the credit of the said account, intituled "The secretary of bankrupts compensation account," were in the month of *August* one thousand eight hundred and thirty-four found inadequate to meet the several payments then due and payable thereout, and the sum of two thousand four hundred pounds was, on application to the lords commissioners of his Majesty's treasury, then advanced and paid by them, through the lord chancellor's secretary of bankrupts, into the bank of *England* to the credit of the said account, for the purpose of enabling the several payments then due to be paid and discharged to the parties entitled thereto; but no power or authority exists under the provisions of the said first-recited act, or otherwise, for the repayment of such sum out of the monies and securities standing to the credit of the said account; be it therefore enacted, that it shall be lawful for the lord high chancellor to order that the said sum of two thousand four hundred pounds so advanced and paid by the lords commissioners of his Majesty's treasury to the credit of the said account, intituled "The secretary of bankrupts compensation account," shall be repaid out of the monies and securities which now are or hereafter may be standing to the credit of such account, and the same shall be repayable and repaid accordingly, and until so repaid be considered a charge on such account; any thing in the said first-recited or other act or acts contained to the contrary notwithstanding.

Lord-chancellor  
to appoint  
accountant in  
bankruptcy.

III. And whereas from the increased amount of the funds belonging to bankrupts estates, and the large number of accounts to which such funds belong, and which are daily augmenting, it appears that such funds and such accounts cannot be properly protected and managed by the said accountant general of the high court of chancery, and it is expedient therefore that an officer experienced in and con-



versant with the mode of keeping accounts, to be called "The accountant in bankruptcy," shall be forthwith appointed to superintend and control the care and management of the said funds; be it therefore enacted, that it shall be lawful for the lord high chancellor for the time being to nominate from time to time as occasion may require some fit and proper person to be the accountant in bankruptcy; which officer so to be appointed shall hold his office during good behaviour, notwithstanding the demise of his Majesty, or any of his heirs or successors: Provided always, that it shall be lawful for the lord high chancellor by any order to remove any such officer for some sufficient reason to be in such order expressed.

IV. And be it further enacted, that at any time after the appointment of the said accountant in bankruptcy it shall and may be lawful for the lord high chancellor, by any general or other order or orders, to direct that the whole or any part of the cash, funds, or securities belonging to bankrupts estates or to suitors in matters of bankruptcy, and then standing in the name or to the credit of the said accountant general of the high court of chancery at the bank of *England*, to the credit of any bankrupt's estate, or of any assignee or assignees of such estate, or in the matter of any bankruptcy, be forthwith paid and transferred into the name and to the credit of the said accountant in bankruptcy; and all such payments or transfers as now are or heretofore have been made into the bank in the name or to the credit of the accountant general of the high court of chancery in matters of bankruptcy shall, from and after the appointment of the said accountant in bankruptcy, be made in the name or to credit of the said accountant in bankruptcy; and all cash, funds, or securities to be so paid or transferred as aforesaid shall be subject to such and the like provisions, regulations, rules, and orders as the same are or would have been subject to if paid or transferred in the name or to the credit of the said accountant general of the court of chancery, except as the same may be altered by this act, or any rule or order to be made by the lord high chancellor in respect of the same.

Bankrupts estates to be transferred into the name of the accountant in bankruptcy.

V. And whereas by an act passed in the sixth year of the

So much of  
6 G. 4. c 16.



## APPENDIX.

as directs the filing of the certificate, and the investment, &c. of unclaimed dividends, repealed.

reign of his late Majesty King *George* the Fourth, intituled "An act to amend the laws relating to bankrupts," it is amongst other things enacted, that the assignees shall file a certificate in the office of the lord chancellor's secretary of bankrupts, containing an account of the names of creditors to whom unclaimed dividends are due, and of the amount of such dividends; and power is thereby given for the investment of such dividends; and after the expiration of three years the lord chancellor is empowered to order the same to be divided amongst and paid to the other creditors in manner therein mentioned; be it enacted, that so much of the said act as directs the filing of the said certificate, and the investment, division, and payment of such unclaimed dividends, be and the same is hereby repealed.

Unclaimed dividends to be paid into the bank to the credit of accountant general, or when appointed, to the accountant in bankruptcy.

VI. And be it further enacted, that all dividends unclaimed as herein-after mentioned, and also any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided amongst the creditors of any bankrupt, shall be paid into the bank of *England* to the credit of the accountant general of the high court of chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to an account to be intituled "The unclaimed dividend account," subject to the order of the lord high chancellor, or of the court of review in bankruptcy, or of any commissioner of the said court, for the payment thereof of any dividend or dividends due to any creditor or creditors, and subject also to the order of the lord chancellor for the laying out and investment thereof in the purchase of government or parliamentary securities, which securities shall be carried to the before-mentioned account to be intituled "The bankruptcy fund account," and shall be subject to such rules and regulations as the said lord chancellor shall direct: Provided always, that any order of any commissioner for payment of any dividend, under the provisions aforesaid, shall be subject to appeal to the said court of review.

How unclaimed dividends, &c. in the hands of

VII. And be it further enacted, that if any assignee under any commission of bankrupt or fiat in bankruptcy now issued



or hereafter to be issued shall have, either in his own hands, <sup>assignees to be disposed of.</sup> or at any bankers, or otherwise subject to his order or disposition, or shall know that there is or are in the hands or subject to the order and disposition of himself and any co-assignee or co-assignees, or of any or either of them, any unclaimed dividend or dividends amounting in the whole to the sum of twenty pounds, or any such undivided surplus as aforesaid amounting to the sum of twenty pounds, such assignee shall, as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends, either pay the same to the creditor or creditors or other the person or persons entitled to the same respectively, or cause a certificate thereof respectively to be filed in the office of the lord chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively; and shall in like manner, as to any such now existing undivided surplus as aforesaid, within one year after the passing of this act, and as to any such future undivided surplus as aforesaid within three calendar months next after the expiration of one year after the final declaration of dividends, cause a certificate stating the full and true amount of such surplus to be filed in the office of the said secretary of bankrupts; and every certificate to be filed as aforesaid shall be signed by the assignee or assignees filing the same; and every assignee who shall, according to the provisions of this act, be bound to file such certificate as aforesaid, and who shall make default in filing the same, shall be charged, in account with the estate of the bankrupt, with interest upon the amount of such unclaimed dividend or dividends or undivided surplus as aforesaid, to be computed from the time at which such certificate is hereby required to be filed, at the rate of five pounds *per centum per annum*, for such



time as he shall thenceforth, either solely or together with any co-assignee or co-assignees, or other person or persons, retain such dividend or dividends or undivided surplus, as the case may be, and also with such further sum as the lord chancellor or the court of review shall direct, not exceeding in the whole at the rate of twenty pounds *per centum per annum*, to be computed from the time aforesaid; and every assignee shall, within one year next after the filing of any such certificate as aforesaid, pay or cause to be paid into the bank of *England* to the name of the accountant general of the high court of chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to the said account to be intituled "The unclaimed dividend account," the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor or creditors or other person or persons entitled thereto, and also the full amount of such undivided surplus as aforesaid; and if any assignee shall make default in such payment it shall be lawful for the lord chancellor or the said court of review, on petition or otherwise, to order that such sum or sums be forthwith paid into the bank of *England* in manner aforesaid, together with such further sum to be charged on such assignee or assignees, or other party or parties personally, as to the said lord chancellor or to the said court may seem fit, not exceeding at and after the rate of twenty pounds *per centum per annum* on the sum or sums so withheld, to be computed from the filing of such certificate up to the time of payment of such sum or sums, and also to make such further order as to costs as the justice of the case shall seem to require; provided always, that no such certificate as aforesaid of any unclaimed dividend or dividends shall be filed until the expiration of one year after the declaration and order for payment of such dividend or dividends.

Certificates to be given to assignees, on production of which bank of England shall receive the

VIII. And be it further enacted, that the said accountant general in chancery or the said accountant in bankruptcy, as the case may be, shall, on the application of any assignee or assignees, give to him or them a certificate or certificates



stating the amount of any sum or sums of money which he or they may be desirous of paying into the bank of *England* under the provisions aforesaid; and on the production of such last-mentioned certificate or certificates the governor and company of the bank of *England* shall receive the sum or sums therein mentioned, and give a receipt or receipts for the same, and shall forthwith carry the same to the credit of the said accountant general or the accountant in bankruptcy, as the case may be, to the said account intituled "The unclaimed dividend account;" and every such certificate and receipt shall be given without fee or reward.

sums therein mentioned and give receipts for the same.

IX. And be it further enacted, that the interest and dividends of all the securities to be purchased under the authority of this act shall from time to time be received by the governor and company of the bank of *England*, and be carried to an account to be intituled "Interest arising from the bankruptcy fund account," to the credit of the accountant general in chancery or the accountant in bankruptcy, as the circumstances may require.

Interest to be received by the governor and company of the bank.

X. And be it further enacted, that out of the interest and dividends of the government or parliamentary securities to be purchased under the authority of this act, and out of the interest and dividends of any government or parliamentary securities to be hereafter purchased and placed to the said account to be intituled "The bankruptcy fund account," there shall be paid by the governor and company of the bank of *England*, by virtue of any order or orders of the lord chancellor to be made for that purpose, to the said accountant in bankruptcy, such salary or yearly sum as the lord high chancellor may by any order or orders direct, not exceeding the yearly sum of eight hundred pounds, and also to the clerks of the said accountant in bankruptcy such sums by way of salary as the lord chancellor shall by order direct, and also any further sum to the said accountant in bankruptcy which may be necessary or expedient to defray the expences of stationery, and other necessary expences of the said accountant, if any, to be by him incurred in discharge of the duties imposed upon him by this act; such several

Salaries and other expences to be paid out of the same by direction of the lord chancellor.



salaries or yearly sums before mentioned to be paid quarterly, free of charges; the first quarterly payment to the accountant in bankruptcy for the time being to commence from the day of his appointment, and as to the said clerks to commence from the eleventh day of *January* one thousand eight hundred and thirty-five, or from such other day as may in any such order be specified: Provided always, that nothing herein-before contained shall authorize the lord chancellor to order the payment in any one year of any sum exceeding the sum of one thousand pounds for the payment of the salaries of the said clerks, and the discharge of such expences of stationery and other incidental expences as aforesaid.

Lord chancellor  
may appoint ad-  
ditional clerks,  
if necessary.

XI. And be it further enacted, that it shall and may be lawful to and for the lord high chancellor, upon the requisition of the said accountant in bankruptcy for that purpose, to appoint one or more, not exceeding five, persons to be clerks to the said accountant, and to order such yearly salaries as aforesaid to be paid to them.

Accountant not  
to retain fees.

XII. And be it enacted, that the salaries herein-before provided shall be in lieu of all fees and emoluments whatsoever; and that all such fees and emoluments, whether for commission, brokerage, or otherwise, as are now receivable by the said accountant general of the court of chancery in matters of bankruptcy, shall, from and after the appointment of the said accountant in bankruptcy, be received by him, and paid into the bank in the name of the said last-mentioned accountant, and be carried to the credit of the said account to be intituled "Interest arising from the bankruptcy fund account," and be applicable to all the purposes of the said account.

Retiring allow-  
ance to Charles  
Elley.

XIII. And whereas *Charles Elley*, the chief clerk in the office of the lord chancellor's secretary of bankrupts, is now of the age of seventy years and upwards, and has been upwards of fifty years in the above office, and from rheumatism and other bodily infirmities is become incapable of giving full attendance so as effectually to discharge the duties of the said office, and the emoluments of his said office were very much reduced by the operation of the said first-



recited act, and the said *Charles Elley* is desirous to be allowed to retire from the said office by reason of such infirmities; be it therefore enacted, that it shall and may be lawful for the lord high chancellor, upon the retirement or removal from his said office of the said *Charles Elley*, to order and direct that there shall be paid to him during his life such annual sum not exceeding four hundred pounds *per annum* as to the said lord chancellor shall seem fit, such annual sum to commence on the retirement or removal of the said *Charles Elley* as aforesaid, and be payable at such time or times as the said lord chancellor shall direct; which said annual sum shall be chargeable upon and payable out of the said account intituled "The secretary of bankrupts compensation account."

XIV. And be it further enacted, that it shall be lawful for the said lord high chancellor, by any order or orders to be by him from time to time made for that purpose, to order and direct that all or any part of the interest and dividends to be carried to the said account to be intituled "Interest arising from the bankruptcy fund account," may be carried over to the said accounts respectively intituled "The secretary of bankrupts account" and "The secretary of bankrupts compensation account," or either of them, and that the same may be applied in payment or in part satisfaction of the annual and other sums now or hereafter to be chargeable upon and made payable out of the sums directed to be carried to the said last-mentioned accounts or either of them, and also to direct that the salaries and other sums by the said first-recited act directed to be chargeable upon or payable out of the fees by the said act directed to be paid to the chief registrar of the court of bankruptcy may be paid out of the said interest and dividends, as the said lord high chancellor shall in his discretion see fit, so that the salaries and other expences of the said court being provided for out of the interest and dividends to be raised as aforesaid, the fees and other sums by the said act directed to be paid may be abolished or reduced as the said lord high chancellor may find himself from time to time enabled to abolish or reduce the same.

Lord chancellor may direct interest from securities to be carried to the secretary of bankrupt's account.



Salaries to be paid on such days as the chancellor shall direct.

XV. And be it further enacted, that it shall and may be lawful to and for the said lord high chancellor, by any order or orders, to direct that all and every or any of the salaries by this act, or the annuities by way of compensation by the said first-recited act, made payable, or any part of any such salary or annuity, shall and may be paid respectively on such days and by such yearly or other payments as in the said order or orders shall be specified; and in case of the death, resignation, or removal of any of the officers or persons entitled to salaries or annuities as aforesaid, by the same or other order or orders to direct that the proportion of any salary or annuity payable as aforesaid which may become due to any officer or person as aforesaid between the time to which any such salary or annuity may have been then last paid or payable and the time of any such death, resignation, or removal, shall be paid to the said officer or other person so resigning or being removed, his executors, administrators, or assigns, or to the executors or administrators of any officer or other such person so dying.

If the fund is not sufficient at any time then the securities to be sold.

XVI. And be it further enacted, that if at any time hereafter the whole or any part of the money placed out in pursuance of this act shall be wanted to answer any of the demands due in respect of the said bankrupts estates, then and in such case the said lord high chancellor may and shall direct the whole or any part of the securities in which the same may be placed to be sold and disposed of, and the money arising from such sale to be paid into the bank of *England* in the name of the said accountant general in chancery or the accountant in bankruptcy, in such manner as the said lord chancellor shall direct, in order that the demands due in respect of the said bankrupts estates may at all times be fully paid out of the common and general cash belonging to such estates.

Securities purchased may be changed.

XVII. And be it further enacted, that it shall be lawful for the lord high chancellor, by any order or orders, to authorize the change of the securities to be purchased pursuant to this act, or any part of the same.



XVIII. And to the end that no suitor or suitors of the said court of bankruptcy may be delayed in payment of any money due to him, her, or them, but that every one may receive his or her full demand whensoever he or she shall apply for the same, in the most easy and expeditious way ; be it enacted, that all the money and cash now deposited in the bank, or that shall at any time hereafter be paid into or deposited in the bank, on the account of bankrupts estates or in any matter of bankruptcy, shall be and be accounted and taken to be one common and general cash, and shall be promiscuously issued and issuable for the answering, paying, and clearing the debts and demands thereon.

Cash in the bank belonging to bankrupts estates to be one common and general cash.

XIX. And be it further enacted, that out of the interest and dividends of the said government or parliamentary securities to be purchased as aforesaid the costs, charges, and expences of all proceedings to be had under this act shall be paid by the governor and company of the bank of *England* by virtue of any order of the said lord high chancellor.

Expences of proceedings under this act to be paid out of the fund.

XX. Provided always, and be it further enacted, that if at any time hereafter the whole or any part of the money to be laid out in pursuance of this act shall be wanted to answer the demand of any bankrupts or their creditors or other persons interested therein, and the stocks, funds, and cash then standing in the name of the said accountant general in chancery or the accountant in bankruptcy to the several accounts before mentioned and created by this act, or either of them, shall not be sufficient to answer and satisfy the said demands, then the same money taken for the purposes and by virtue of this act shall be and shall be considered a debt due from the public, and to such extent as may be necessary shall be answered and made good by parliament accordingly.

If money not sufficient for the purposes of this act, the same to be made good by parliament.

XXI. And whereas by the firstly herein-before recited act it is enacted, that there shall be a chief judge and three other judges of the said court of bankruptcy, and that there shall be two registrars and eight deputy registrars of the said court : And whereas a vacancy having occurred by the death of one of such judges, such vacancy has not been supplied, and it appears that the duties of the said court may be effec-

Court in future to consist of one chief judge and two judges.



In the event of death or removal of a registrar, vacancy to be supplied by deputy registrar acting under him.

tually performed by the chief judge and two other judges; be it therefore enacted, that hereafter there shall be only two judges of the said court other than the chief judge; and it also appearing that upon the appointment hereby authorized being made of an accountant in bankruptcy, part of the duties now performed by the chief registrar of the said court may be discharged by such accountant, so that the duties now performed by the two registrars and the two deputy registrars not attached to the commissioners of the said court may be discharged by two registrars and one deputy registrar; be it therefore enacted, that as and when any vacancy may occur by the death, removal, or retirement of any one of the said registrars, such vacancy shall be supplied by the deputy registrar acting under the registrar by whose death, removal, or retirement such vacancy shall occur; and that when any vacancy shall occur by the death, removal, or retirement of either of the said two last-mentioned deputy registrars, such vacancy shall not be supplied so as to provide altogether for more than two such registrars and one such deputy registrar, other than the six deputy registrars attached to the commissioners aforesaid; and it shall be lawful for the court of review, when and as any such vacancy shall occur, to make such general orders as to the duties to be performed by such registrars and deputy registrar as they shall think fit.

Annual returns to parliament.

XXII. And be it enacted, that within two months from the first day of *January* in every year returns shall be presented to parliament if then sitting, and if not, then within one month after parliament shall have assembled, by the said accountant general of the court of chancery or the accountant in bankruptcy (as the case may be), of the net amounts at the credit of the said accountant on the said first day of *January* on each of the following distinct accounts, which returns shall respectively specify the amount transferred and paid out as dividends, and the amount paid by orders of court or of the judges, and shall also show the unappropriated balance then existing on each account; *videlicet*, first, the bankruptcy fund account; second, the interest arising from the



bankruptcy fund account ; third, the unclaimed dividend account ; fourth, the secretary of bankrupts account ; fifth, the secretary of bankrupts compensation account ; the fourth and fifth of such accounts to have appendixes attached to them, detailing all payments made from such accounts, and to whom made, and whether as salaries, compensations, or other allowances.

XXIII. And whereas by the said first-recited act it is enacted, that the six commissioners therein mentioned may be formed into two subdivision courts, consisting of three commissioners for each court for the purposes therein mentioned ; and that all references and adjournments by a single commissioner to a subdivision court by virtue of the said act shall be to the subdivision court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such subdivision court, or for other sufficient cause, shall think fit otherwise to direct ; be it enacted, that in case of the nonattendance of any one or more of the commissioners of either of the said subdivision courts, to be duly summoned for that purpose, the reference shall not be of necessity to the other subdivision court, but it shall and may be lawful for the remaining commissioner or commissioners of such subdivision court to call in and require the attendance of either or any of the commissioners of the other of the said subdivision courts, and that such commissioners may form a subdivision court for the purposes of the said recited act as fully and effectually as either of the two subdivision courts so now authorized to be formed as aforesaid.

Mode of forming subdivision courts in case of nonattendance of any commissioners of the division to which cause is referred.

XXIV. And be it enacted, that the said court of review and either of the said subdivision courts, and also any judge or commissioner of the court of bankruptcy, shall have power to administer oaths on affidavits to be sworn before them respectively in matters of bankruptcy in all cases where the same may be administered by a master in ordinary or extraordinary of the high court of chancery, and to take for every such oath, except where such oath shall be administered to an affidavit entitled in the court of bankruptcy or in the

Power given to courts to administer oaths on affidavits.

Fees.



court of review, the fee of one shilling and sixpence, which said fee shall be payable and paid accordingly ; and that all such fees shall be accounted for and paid over to the chief registrar of the said court of bankruptcy, and be carried to the account of the second schedule of fees annexed to the said first-recited act, and be applied to the purposes of the said schedule.

Court of review  
and subdivision  
courts declared  
to have been  
courts of record  
from the passing  
of 1 & 2 W. 4.  
c. 56.

XXV. And whereas doubts have been entertained whether, by the terms of the said first-recited act, the said court of review and subdivision courts have been effectually made courts of record ; and whether the said courts have upon an examination before them the same powers of commitment for the purpose of enforcing discovery as were vested in commissioners of bankrupt under the acts of parliament relating to bankrupts in force at the time of the passing of the said first-recited act ; and it is expedient that such doubts be removed, and that such powers as are herein-after mentioned should be given to the several judges and commissioners acting under the authority of the said first-recited act ; be it enacted, and it is hereby declared, that the said court of review and the said several subdivision courts respectively shall henceforth be, and shall be deemed and taken from and after the passing of the said first-recited act to have been, courts of record, and shall and may have and exercise all such powers of commitment as were vested in commissioners of bankrupt acting as such at the time of the passing of the said first-recited act, and shall and may have, use, and exercise all the powers, rights, privileges, and incidents of a court of record, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law at *Westminster* ; and all orders heretofore pronounced and all acts done by the said court of review and subdivision courts respectively shall be deemed and taken to have been pronounced and done by the said courts respectively as courts of record ; and every judge or commissioner appointed or to be appointed by virtue of the said first-recited act sitting alone and acting in execution of the duties imposed upon him as such judge or commissioner shall have, use, exercise,



and enjoy all the powers, rights, privileges, and exemptions of a court of record: Provided always, that nothing herein contained shall be deemed or taken to authorize or empower any such judge or commissioner sitting alone to impose any fine or commit for a contempt of court, but every contempt of any such judge or commissioner sitting alone and acting as aforesaid shall be cognizable by the said court of review, to which the same may be referred by any such judge or commissioner as aforesaid; and the said court of review shall have full power to deal with the same as a contempt of the said court of review: Provided also, that nothing herein contained shall be deemed or taken to diminish or affect the power by the said first-recited act given to any such judge or commissioner of committing any person examined before him to any messenger or other officer of the court of bankruptcy.

XXVI. And be it further enacted, that the powers and authorities given by this act to the lord high chancellor shall and may be exercised in like manner and are hereby given to the lord keeper or lords commissioners for the custody of the great seal respectively for the time being.

As to the exercise of the powers given by this act.

XXVII. And be it further enacted, that this act may be altered, varied, or repealed by any act to be passed in this session.

Act may be altered in present session.

XXVIII. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

Public act.



## APPENDIX.

## APPENDIX C.

## NEW ORDERS made by the LORDS COMMISSIONERS.

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*Order for Payments to the Bank.*

Saturday, 31st October 1835.

Lords Commissioners.

## In the matter of bankruptcy.

Whereas by an order of the court of review, dated the 12th day of January 1832, it was ordered that each official assignee shall pay into the bank of England, to the credit of the accountant general of the high court of chancery, all such sums of money as shall come to his hands as soon as they shall amount to 100*l.*; and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts, and the particular estate to which the money belongs, and that it is to be placed to the credit of the said accountant general and of such particular estate, and shall take a receipt for the same from the cashier of the bank, and carry it to the office of the accountant general, who will give a proper voucher for such receipt, such voucher to be produced when called for by the commissioner.

We do order that the above-recited order be altered, and that from henceforth the order be as follows :

That each official assignee shall pay into the bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands as soon as they shall amount to 100*l.*, and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and the description of the bankrupt or bankrupts, and the particular



estate to which the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy and of such particular estate, and the official assignee shall take a receipt for the same from the cashier of the bank, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt in the books kept in the office of the accountant in bankruptcy.

C. C. PEPYS, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

*Order for Payment by the Bank.*

Saturday, 31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

Whereas by an order of the court of review, dated the 19th day of March 1832, it was ordered that all sums of money which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignee, or for the discharge of the solicitor's bill, or of any other lawful expenses incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the bank of England as aforesaid at such times and in such manner as any one of the judges of this court shall by order under his hand direct, provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom or to whose order the same is to be made; and the accountant general of the high court of chancery shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, without any further evidence of the same being due and payable, and without any further order or direction from this court.

We do order that the above-recited order be altered, and that from henceforth the order be as follows:

That all sums of money which are by law payable out of



any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignee, or for the discharge of the solicitor's bill, or of any other lawful expenses incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the bank of England as aforesaid at such times and in such manner as any one of the commissioners shall by order under his hand, testified by a deputy registrar, direct, provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom or to whose order the same is to be made, and the accountant in bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, by a draft subscribed to and on the same paper with the said order.

C. C. PEPYS, C. S.

LANCELOT SHADWELL, C. S.

J. B. BOSANQUET, C. S.

*Order as to Exchequer Bills.*

Saturday, 31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

Whereas by an order of the court of review, dated the 10th day of March 1832, it was ordered that any one of the judges of the court of bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money which may have been paid into the bank of England by any official assignee to the credit of the bankrupt's estate, to be invested in the purchase of exchequer bills; and may, in like manner, direct the sale or exchange of such exchequer bills, and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the bank of England to the credit of such estate, and may direct the proceeds thereof to be laid out in the purchase of



exchequer bills, to be carried to the credit of the accountant general of the high court of chancery, shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction from this court, and the expenses thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made.

We do order that the above-recited order be altered, and that from henceforth the order be as follows:

That any one of the commissioners of the court of bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money which may have been paid into the bank of England by any official assignee on account of any bankrupt's estate, to be invested in the purchase of exchequer bills to be lodged in the bank of England; and may, in like manner, direct the sale or exchange of such exchequer bills; and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the bank of England, on account of any bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of exchequer bills to the credit of the said accountant in bankruptcy, and that such exchequer bills when so purchased be deposited in the bank of England to the credit of the said accountant and of such particular estate; and the said accountant shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction, and the expenses thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made: Provided always, that the signature of the commissioner be attested by a deputy registrar, and that the order of the accountant in bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order: Provided further, that no stock or public fund be transferred upon any sale, and that no exchequer bill, India bond, or other public security be delivered for the purposes of a sale.



except to a cashier of the bank of England, until the price or value thereof be paid into the bank of England, to the credit of the accountant in bankruptcy and of the particular estate to which it belongs, and that no sum be paid for the purchase of any exchequer bill, India bond, or other public security, until such exchequer bill, India bond, or public security be deposited in the bank of England to the credit of the said accountant in bankruptcy and of the particular estate.

C. C. PEPYS, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

Whereas by an order of the court of review, bearing date the 28th day of March 1832, various provisions were made respecting the payment of dividends, and the payment and re-investment of exchequer bills ; which order it is expedient to alter.

We do therefore order that the said order of the 28th day of March 1832 be rescinded, and that instead thereof the order be as follows ; that is to say,

First. When a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors, in alphabetical order, and shall state in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall to each name prefix a number in regular series, together with the date of the order of the dividend and the date of his signature, according to the forms in the schedule (A.) hereunto annexed, and the solicitor shall cause one of such lists which specifies such securities to be filed with the proceedings, and the other of such lists which specifies the securities he shall deliver to the assignees chosen by the



creditors, or such one or more of the assignees as the commissioners shall direct.

Second. When the list is delivered by the solicitor to the creditors assignees or assignee, such assignees or assignee shall examine such list, and as far as it is correct sign and return the same to the solicitor.

Third. Upon the receipt of the list from the creditors assignees the solicitor shall deliver it to the official assignee, together with the list not specifying the securities, and the official assignee shall examine and sign the list, if correct, and shall prepare books at the expense of the estate; containing as many blank drafts as may be necessary, and shall number and fill up a draft for each dividend, and insert in each draft the name of the creditor to which the number of such draft is prefixed in the list and the dividend payable to him, and shall keep the list specifying the securities in his custody, and shall take the books containing such drafts, together with the list not specifying the securities, to the accountant in bankruptcy, who shall ascertain that the amount of such drafts does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the drafts with the lists, and as far as they are correct shall sign the drafts in the books, and he shall keep in his custody the list of creditors, and return the drafts to the official assignee, by whom they shall be countersigned according to the form in schedule (B.) appended to these orders, and the cashiers of the bank shall pay such drafts out of the monies standing to the credit of the account entitled the "Bankrupt dividend account."

Fourth. And it is further ordered, that if after such list shall have been so deposited with the said accountant it shall from any cause seem expedient to the commissioner that such drafts shall be altered, the said commissioner may order such alterations as to him may seem just, or may direct a new list to be made and new drafts to be drawn, and the old drafts cancelled, and such altered or new drafts shall be filled up and signed, and paid in the manner herein-before directed.



Fifth. When a dividend has been or may be declared under any fiat or commission, and where any part of the bankrupt's estate shall have been paid into the bank of England by any official assignee, any one of the commissioners of the court of bankruptcy may, by order under his hand, direct the sum ordered to be divided, or such parts thereof as may be required, to be carried over from the general account standing in the bank of England in the name of the accountant in bankruptcy, and of such particular estate, to the account kept in the bank of England entitled the "Bankrupt dividend account;" and it is further ordered, that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the commissioner may, by order under his hand, direct such sum to be carried back to the general account and of the particular estate to which it belongs, and the same shall thereupon be carried back accordingly, and a certificate of such transfer shall be sent to the office of the accountant in bankruptcy.

Sixth. Upon the death, sickness, or unavoidable absence of the accountant in bankruptcy or of any official assignee, any two of the commissioners may, by order under their hands, make such order as to them may seem expedient to carry the aforesaid orders into effect; provided that such order be confirmed by the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, or by some one judge of the court of review.

Seventh. When a creditor, or any person duly authorized under his hand to receive his dividend, shall apply for payment, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof; and if satisfied that the amount of the said dividend still remains due shall fill up the date in the draft and receipt, and upon the creditor or such other person authorized as aforesaid signing the receipt for such dividend the official assignee shall mark the securities (if any), with the amounts of that dividend, and shall sign and deliver the



## APPENDIX.

xxix

draft for the same ; provided that no dividend shall be paid to any creditor holding any security for his debt, until such security shall be produced, without the special directions of a commissioner in that behalf.

C. C. PEPYS, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.



APPENDIX.

SCHEDULE (A.)—FORM I.

Of which two copies are to be provided by the solicitor, one to be filed with the proceedings, and one delivered by him to the official assignee, who is to keep the same.

In the matter of                      a bankrupt.

Before Mr. Commissioner

Creditors assignees,  
Official assignee,  
Solicitor,  
Dividend,

Declared amount,

No.	Creditors. To be placed alphabetically, and the names of the parties to the proof to be carefully set forth.	Residence and Description.	Proofs.	Claims.	Dividends.	Bills and Securities exhibited.			Sum.
						Date of Bill or Note.	Drawer.	Acceptor.	Indorser.

Solicitor.  
day of                      189



FORM II.

Of which one copy is to be provided by the solicitor, and to be delivered by him to the official assignee, together with the former list, after it has been examined by the creditors assignee.

In the matter of a bankrupt.

Before Mr. Commissioner

Creditors assignees,  
Official assignee,  
Solicitor,  
Dividend,

Declared amount,

No.	Creditors. To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.	Proofs.	Claims.	Dividends.
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Solicitor. day of 183

SCHEDULE (B.)

£ Bankrupt Dividend Account, No.

Estate of bankrupts.  
Fifth dividend London, 183  
Pay to or bearer, the sum of

To the cashiers of bank of England.

N.B. This draft must be indorsed by the payee.

Accountant.  
Official assignee.







## APPENDIX D.

## NEW ORDERS.

Court of Bankruptcy,  
21st July 1835.

It is ordered, that when any person shall have been chosen and appointed to act as official assignee, he shall, upon filing his appointment and lodging his securities with the chief registrar, be forthwith attached to the list of one of the commissioners having the smallest number of official assignees on their lists, and where the number upon several lists shall be equally small, he shall be allotted by the chief registrar to one of them by ballot, except where it shall be otherwise specially ordered by the court of review.

T. ERSKINE, C. J.

J. CROSS, J.

G. ROSE, J.

Approved C. C. PEPYS, C. S.

LANCELOT SHADWELL, C. S. (a)

14th day of May 1836.

Lord Chancellor.

In the matter of bankruptcy.

Whereas it was ordered on the 31st day of October 1835, by the lords commissioners for the custody of the great seal, that no dividend should be paid to any creditor holding any security for his debt until such security shall be produced, without the special direction of a commissioner in that behalf: and whereas the mode of proceeding in such cases has been attended with doubt and difficulty; I

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(a) Certificate in pursuance of the above order:—" This is to certify that I have allotted to your list of official assignees under the general rule in bankruptcy on the 21st of July last, dated this

" C. LAWES, Chief Registrar."

" To Mr. Commissioner

VOL. II.

[d]



do order that from henceforth, upon the statement by a creditor that he is unable to produce his security, and that he same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings; and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security, and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by a commissioner, and upon such indemnity being given the official assignee shall pay the dividend to the creditor.

COTTENHAM, C.

1st day of July 1836.

Lord Chancellor.

In the matter of bankruptcy.

I do order that when a cheque has been signed by the accountant in bankruptcy, for the payment of a dividend to a deceased creditor of a bankrupt, the indorsement of such cheque by the executor or administrator of such creditor shall be deemed sufficient.

COTTENHAM, C.

1st of September 1836.

Lord Chancellor.

In the matter of bankruptcy.

Whereas it appears to me to be expedient that the several accounts of bankrupts, now kept at the bank of England, should be united in one general account, I do order that from henceforth the bank of England shall not keep an account of each particular estate, but only one general account with the accountant in bankruptcy:

And whereas by an order, dated the 31st day of October 1835, it was ordered that each official assignee shall pay into the bank of England, to the credit of the accountant



in bankruptcy, all such sums of money as shall come to his hands as soon as they shall amount to 100*l*., and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the bank of England, the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy, and of such particular estate; and the official assignees shall take a receipt for the same from the cashier of the bank of England, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt in the books kept in the office of the accountant in bankruptcy :

I do order that the said order, dated 31st day of October 1835, be varied, and for the future be as follows; viz.

That each official assignee shall pay into the bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands as soon as they shall amount to 100*l*., and at the time of paying in such monies shall state in writing, delivered therewith to the bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy, and the official assignee shall take a receipt for the same from the cashier of the bank, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the accountant in bankruptcy.

COTTENHAM, C.

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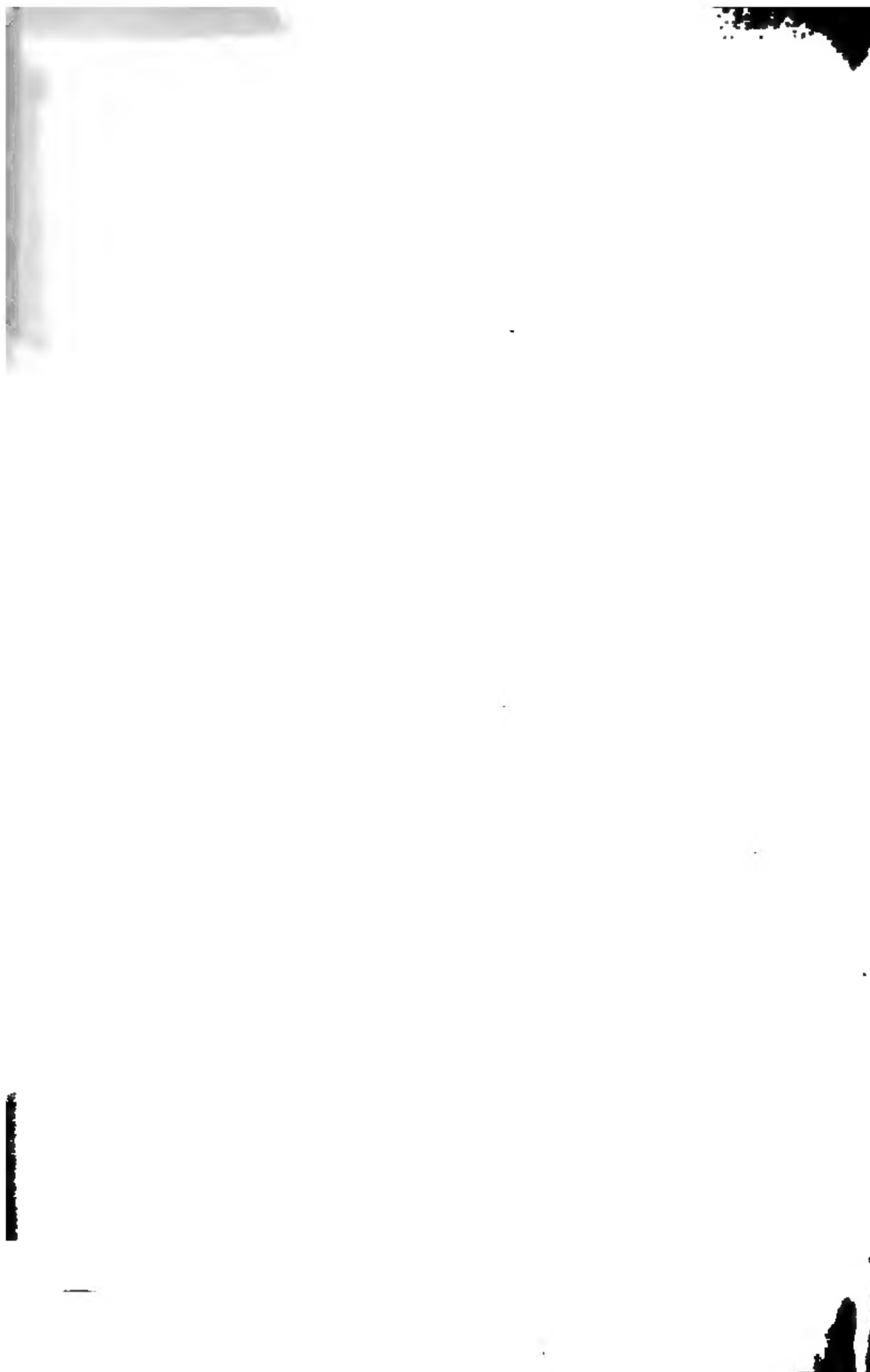










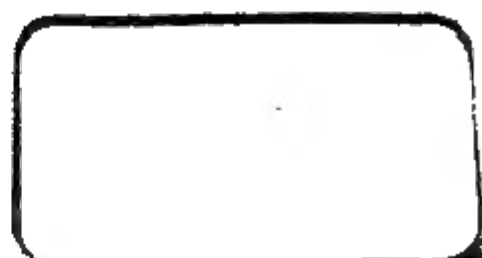




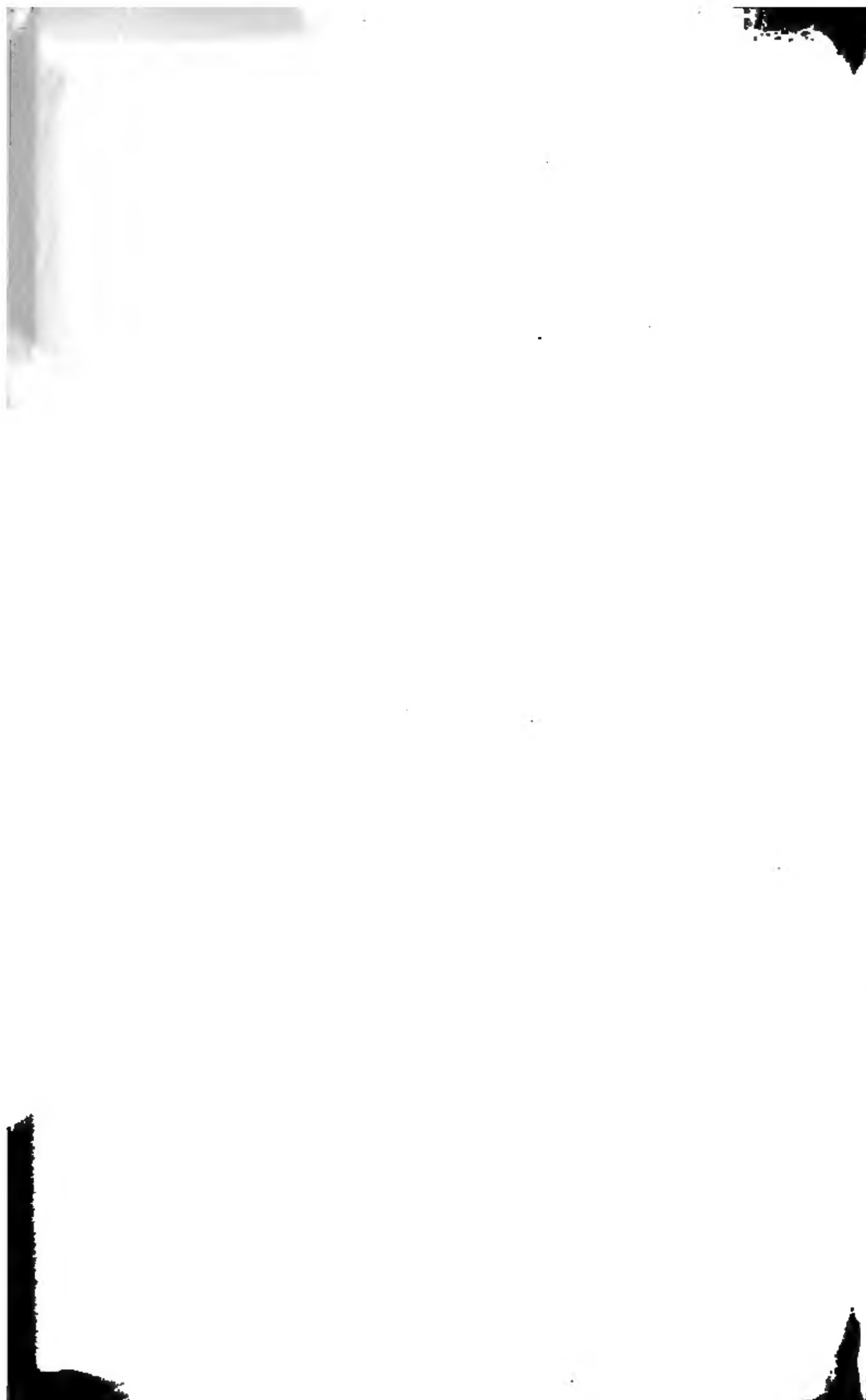
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